Prosecuting Officers and the Administration of Criminal Justice in Nova Scotia

A Study Paper

Prepared for
The Royal Commission on the Donald Marshall, Jr., Prosecution

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Executive Summary

This study examines the structure and administration of Nova Scotia's prosecution service, and the manner in which prosecutorial discretion is exercised within the province. In essence it examines one division of the province's "public law firm" and after identifying its weaknesses proposes methods by which it might be improved.

Looking first to organizational structure, regional offices are proposed to coordinate decision-making in the field and to create an effective middle level of management. With the head office thus freed from day-to-day involvement in routine cases, the study proposes appointment of a Director of Criminal Justice Policy Development to assist those with direct operational responsibilities in the elaboration of longer term policies and reforms. A specialized senior prosecutions unit is recommended for handling complex or lengthy cases which might disrupt personnel assignments in regular units, and also for training personnel. Improvements in the efficiency of the prosecution service through modernized research facilities, adequate administrative support, comprehensive continuing education and personnel evaluation are recommended. Finally, the maintenance of a highly trained staff through payment of competitive salaries and advancement through an appropriate career path is recognized as a high priority need.

The exercise of prosecutorial discretion is analyzed through a series of legal and policy issues, which are all linked by a concern to assure openness, accountability and freedom from partisan political interference in the administration of criminal justice. Three sets of recommendations, however, deal with these broad issues, and are linked to the administrative structure of the prosecution service. The first is a recommendation that the general instructions or guidelines by which Crown prosecutors govern their conduct be published and made available to accused persons, legal professionals and the public at large. The second is that the process by which prosecuting officers are engaged be structured so that merit is, and is seen to be, the primary criterion in hiring prosecutors. The third is the creation of the office of Director of Public Prosecutions (D.P.P.). The D.P.P. should be appointed for a fixed term, have responsibility for the daily management of the prosecution service and, in the event of disagreement, be subject to the Attorney General's direction in particular cases only through written and, ultimately, public instructions. It is recommended that in such a system the Attorney General retain responsibility for general criminal justice policy development and the promulgation of general guidelines or instructions for the operation of the prosecution service. In other words, the D.P.P. would have operational independence while ultimate control and political accountability to the legislature would rest with the Attorney General.

A number of specific issues (identified through empirical research) are addressed concerning problems in the manner in which prosecutorial discretion is exercised in the province. Clarification of the police duty to investigate offences and the public right to lay charges free from interference by Crown prosecutors is highlighted. The Crown's right to terminate any proceedings in the public interest is discussed, and there is proposed a clearly articulated list of factors which can and cannot be taken into account when terminating prosecutions in the public interest, even in the face of evidence which could sustain a conviction. Both issues of police independence and public interest factors in prosecutions are intended to assure public confidence in the non-partisan fairness of the criminal justice system.

Recommendations are made which relate to the procedural fairness of the criminal trial process. Improvements in the guidelines for disclosure of the Crown's case to the defence are put forward. Similarly, recommendations are made concerning police disclosure to Crowns as a precondition of Crown disclosure to defence. The regularization of plea discussions is advocated, by means of the adoption of enforceable rules, to ensure that guilty pleas flowing from such discussions are obtained in an open, voluntary, accurate and fair manner. These proposals on plea negotiation make special reference to the situation of the unrepresented accused. Important technical recommendations are made concerning pre-trial conferences, use of summaries to trial judges and use of preliminary transcripts in non-jury trials. Finally, guidelines are proposed concerning the propriety of informal contact between Crown counsel and judges.

While this study did not make a wide ranging examination of problems faced by visible minorities caught up with the criminal justice system, it does propose that the Attorney General develop diversion programs and sentencing alternatives in consultation with visible minority communities. It also proposes that Crown prosecutors receive special training about the nature of adverse effects of discrimination in the criminal justice system, and the manner in which they may carry out their duties so as to assist in reducing such discrimination.

Preface

The wrongful conviction of Donald Marshall, Jr. in 1971 for a murder he did not commit has raised questions about the role of the prosecuting officer in the administration of criminal justice in the Province of Nova Scotia. How do prosecutors and police interact with respect to the laying of criminal charges? What standards are to be observed by Crown prosecutors concerning the disclosure of the prosecution's case to the defence? How do Crown and defence counsel deal with one another? What is the proper place of plea negotiation in the administration of justice? What constraints are there on the manner in which a prosecutor presents the Crown's case and relates to the trial judge? How does the Attorney General's Department assert control over its prosecuting officers? Is there partisan political interference in the administration of criminal justice in the province? These are the major issues upon which this study is intended to shed some light.

The study was undertaken at the request of the Royal Commission on the Donald Marshall, Jr., Prosecution. The general research objectives identified at its inception were as follows:

(1) To describe the role of the local Crown prosecutor in the administration of criminal justice in Nova Scotia as it had evolved in 1971 and has continued to evolve until the present time, in both theory and practice;

(2) To evaluate the role of local Crown prosecutors in Nova Scotia, past and present, in accordance with modern standards for the discharge of this function; and

(3) To make certain recommendations for change where necessary to bring Nova Scotian practice into line with such standards.

These research objectives reflect the fact that although the events which spawned this Royal Commission happened in 1971, there can be no recommendations made to prevent the recurrence of a similar tragedy without reference to how the Nova Scotian criminal justice system has changed in the intervening period and how it operates today. A study of this nature must carefully distinguish between the is and the ought. What is the present law and policy? How are such laws and policies carried into practice, if at all? What principled recommendations can be made to improve the present system which are of a practical nature and can in fact be implemented?

The methodology adopted to carry out this somewhat daunting mandate has been of an interdisciplinary nature. Traditional legal research has been employed to describe the historical evolution of the role of the prosecuting officer and to present the prosecutor's

functions in the province's modern system of criminal justice. Social science methodology has been used to gather and analyze empirical information concerning the actual practice of Crown prosecutors in the field. In reliance upon this doctrinal and empirical research, policy analysis has led to the formulation of recommendations for improving the system. The final methodological step was the submission of the first draft of this report to a peer review process involving those persons named in Appendix 1 who gave willingly of their time in a day-long consultation. Special thanks are owed by the author to John E.S. Briggs, Ken Chase, John Ll.J. Edwards, Gordon F. Gregory, H. Archibald Kaiser, Marc Rosenberg and Phillip C. Stenning for their particularly helpful written comments, although they, of course, bear no responsibility for the views expressed in this final draft.

Many of the sources canvassed in the doctrinal research (but by no means all) are referred to in the footnotes which accompany the text and require no elaboration. A word of explanation is in order, however, concerning the methodology employed in the empirical research. Two primary techniques were relied upon. The first, which is sometimes called "elite interviewing" was used to gather observations and data from officials of the Attorney General's Department. The author personally interviewed four key players from that Department: the Executive Director of the Legal Services Division, the Director (Criminal), the Director (Prosecutions) and the Executive Director, Administration and Finance Division. All of these individuals were extremely helpful, both in the personal observations which they made and in the relevant documents on the operations of the Attorney General's Department which they were able to provide.

The second important aspect of the empirical research was the gathering of information by questionnaire from Crown prosecutors and from members of the criminal defence bar in early 1988. The author owes a debt of gratitude to all those who gave willingly of their time to fill in a very detailed questionnaire. The Crown Survey, as it has been called throughout the text of this study, involved sending questionnaires to all 68 Prosecuting Officers and Assistant Prosecuting Officers who were in the employ of the Attorney General's office. Responses were received from 43 prosecutors representing all ranks. These questionnaires were distributed, collected, processed and analyzed on a completely anonymous basis with the assistance of the Survey Centre of the Gorsebrook Research Institute in Halifax. The response rate is a very high one by social science standards. As a result, it can be said that one can be 95 percent sure that the sample average will be within ten percent of the population mean. The questionnaire, along with all of the answers

which could be coded numerically and a representative sample of the open-ended comments, is found as the final Appendix to this study (Appendix 24). It has not been possible to include with the text of the study a complete statement of all open-ended comments or a presentation of the results of all cross-tabulations done to the data. However, some of this information is included in the body of the text and the author has on file the complete results of all operations.

The Defence Survey consisted of a questionnaire sent to 99 lawyers who were employed by Nova Scotia Legal Aid or who were members of the Canadian Bar Association Criminal Law Subsection (other than prosecutor members!). Responses were received from 51 defence counsel and were processed by the Survey Centre of the Gorsebrook Institute in a manner similar to the Crown Survey. This too is a very high response rate, allowing the same statement concerning the reliability of the results as in relation to the Crown questionnaire. In many cases, the questions asked of defence counsel were identical to or the mirror image of questions posed to the Crown prosecutors. Therefore, wherever possible the results of the Defence Survey have been integrated in Appendix 24(i) with the results of the Crown Survey. However, since not all questions fit neatly into this pattern, the defence counsel questionnaire is found as Appendix 24(ii) to this study.

The results of the research conducted for this study are presented in two parts. Part 1 is entitled the Historical Development and Administrative Structure of Nova Scotia's Prosecution Service. This part presents information on the origins of the prosecutor's role in Nova Scotia, provides the statutory structure both past and present within which the province's prosecuting officers operate, and finally gives an analysis of the present system of management of prosecuting officers, including information on their salaries and working conditions. Part 2 addresses what might be thought to be the more controversial aspects of this study. Entitled "The Exercise of Prosecutorial Discretion in Nova Scotia", it looks at the role of prosecutors in the investigative stage, the laying of charges, disclosure, plea negotiation, and presenting the Crown's views to the court. Part 2 concludes with sections on allegations of partisan political pressure in relation to the prosecution of offences in Nova Scotia, and problems linked to systemic racism in the administration of criminal justice in the province.

Part 1
The Historical Development and Administrative Structure of Nova Scotia's Prosecution Service

The label "prosecution service" is not one familiar to most people in Nova Scotia. However, it seems to be an apt phrase to describe the 68 or so full and part time employees of the Attorney General's Department who conduct the prosecution of criminal and quasi-criminal offences on behalf of the people of Nova Scotia - or on behalf of the Crown, if that phrase be preferred. The way in which the prosecution of offences is handled has altered dramatically since the early days of colonial Nova Scotia. The evolution from then until the present is covered first in this part. The bulk of this part, however, is devoted to a description of the structure and administration of the present day prosecution service. An account of the senior management in the Attorney General's Department is given, followed by a profile of the corps of prosecuting officers. This part concludes with a discussion of the working conditions under which Crowns labour and the level of morale with which they execute their daily tasks.

1.1 The Historical Evolution of the Prosecuting Officer Position

The position of full time prosecuting officer is a relatively recent phenomenon in the history of the administration of justice in Nova Scotia. Some people still active in the present judicial and prosecutorial apparatus began their careers under the old system of part time prosecutors. The patterns of interaction of the former era may thus usefully be explored in relation to the role of the prosecutor at the time of the Marshall trial in 1971 and even the role of the prosecutor today. This historical outline will begin with a condensed summary of the role of the Attorney General as it has traditionally been understood in relation to the administration of criminal justice. There follows a brief description of prosecution of criminal offences in the early colonial period, and a limited picture of prosecution following the major reforms of the 1840's and into the early years of Confederation. The section will then move to a short presentation of the period of the regularized part time prosecution service, which ran from the early 1900's until the 1960's, before outlining the legislative basis for the modern prosecution service which began in 1966.

1.1.1 The Role of the Attorney General

The office of the Attorney General is key to the understanding of the prosecution of offences. While the office of Attorney General in Nova Scotia is the subject of a separate study being done for the Commission, a brief outline of the Attorney General's role is necessary to establish a framework for what follows. The Attorney General's office had its origins in Nova Scotia with the prerogative instruments issued to early governors and lieutenant-governors by

which the latter established royal authority in the colony.[1] In the absence of statutory authority, early Nova Scotian Attorneys General were appointed to carry out the duties traditionally associated with the law offices of the Crown in England.[2]

Section 4 of the present *Public Service Act* [3] sets out the role of the Attorney General in the following terms:

"4. The functions, powers and duties of the Attorney General shall be the following:

(a) he shall be the law officer of the Crown, and the official legal adviser of the Lieutenant Governor, and the legal member of the Executive Council;

(b) he shall see that the administration of public affairs is in accordance with the law, and shall have the superintendence of all matters connected with the administration of justice in the Province not within the jurisdiction of the Dominion of Canada;

(c) he shall advise the heads of the several departments upon all matters of law concerning such departments or arising in the administration thereof;

(d) he shall have the settlement and approval of all instruments issued under the Great Seal;

(e) he shall have the regulation and conduct of all litigation for or against the Crown or any public department in respect of any subject within the authority or jurisdiction of the Government;

(f) he shall have the functions and powers which belong to the office of the Attorney General of England by law or usage so far as the same are applicable to this Province, and also the functions and powers which previous to the coming into force of The British North America Act, *1867, belonged to the office of Attorney General in the Province of Nova Scotia and which under the provisions of that Act are within the scope of the powers of the Government of the Province;*

(g) he shall have such other powers and discharge such other duties as are conferred and imposed upon him by any Act of the Legislature of the Province, or by Order in Council made under the authority of any such Act. R.S., c. 240, s. 4."

1. For a good overview of the role of Nova Scotian Attorneys General, see J. Murray Beck, "Rise and Fall of Nova Scotia's Attorney General 1749-1983" in Yogis, J.A. (ed.), Law in a Colonial Society, Carswell, Toronto, 1984, pp. 125-142. See also P.B. Waite, "An Attorney General of Nova Scotia, J.S.D. Thompson, 1878-1882: Disparate Aspects of Law and Society in Provincial Canada," in Law in a Colonial Society, *ibid.* pp. 165-183; and Hon. John Doull, "Sketches of Attorneys General of Nova Scotia 1750-1926", Halifax, 1964.

2. The most complete description of the duties of these officers is found in J.LJ. Edwards, "The Law Officers of the Crown", Sweet and Maxwell, London, 1964, as updated by Professor Edwards "The Attorney General, Politics and the Public Interest", Sweet and Maxwell, London, 1984, and in his other writings on the subject. An excellent concise presentation of these matters is found in Philip C. Stenning, "Appearing for the Crown: A Legal and Historical Review of the Criminal Prosecutorial Authority in Canada", Brown Legal Publications, Cowansville, 1986, especially Chapters 1-4. The description in the text is based primarily on these sources.

3. *Public Service Act*, R.S.N.S. 1967, c. 255, s. 4, as amended.

While the manner in which this statutory mandate has been translated into departmental administrative structure is discussed below, it is essential at this point to briefly set out the Attorney General's traditional responsibilities in relation to the prosecution of offences.

The office of Attorney General had been established in England by the 16th century. By that time most prosecutions were taken, at least nominally, in the name of the Sovereign, and the Sovereign had the right exercised through his representatives to intervene in and terminate such proceedings. From this general principle there evolved a number of powers associated with the chief law officer of the Crown. While the Attorney General, like any other subject, might initiate a criminal prosecution by laying an information before a justice of the peace and having the matter made the subject of a preliminary inquiry (and presentment of an indictment to a grand jury for possible trial before a petit jury), the Attorney General might commence a proceeding by way of an *ex officio* information. This had the effect of putting the matter before the highest court without preliminary inquiry or grand jury procedures, and abuse of *ex officio* informations became the focus for political and constitutional struggle over the course of some centuries. The modern Canadian remnant of this procedure can be seen in *Criminal Code* Sections 574 and 577 in the power of the Attorney General to "prefer a direct indictment".

The Attorney General was recognized as well to have the "right of trial at bar", which in essence meant the right to have a matter tried by the Court of King's Bench *in banco* sitting at Westminster rather than at a county assize. This right was broadened to be understood as the right of the Crown to choose the trial venue, a right still recognized in Canadian criminal law today, at least within the ambit of court jurisdiction imposed by the *Criminal Code* and provincial statute.

The pre-eminent status of the Attorney General came to be acknowledged professionally and procedurally. If the Attorney General appeared personally to prosecute an offence, he had the right to the last word in addressing the court even when the defendant chose not to call witnesses. This personal right of reply was not abolished in England until 1964. In addition, the Attorney General was recognized as the head of the English bar with the right to be heard before any other barristers in any matter in which he appeared personally.

The English Attorney General also had control over the rudimentary system of appeals which existed up until the 20th century in criminal matters. Appeals by way of writs of error in relation to irregularities apparent on the face of the record were

within the discretion of the Attorney General who retained considerable control over the process even after the creation of the English Court of Criminal Appeal in 1907.

The complete nature of the Attorney General's control over criminal prosecutions is apparent in the recognition by the 16th century of his power to terminate proceedings, even those instituted by a private prosecutor, through the entry upon the record of a *"nolle prosequi"*. The literal translation of the phrase, "I am unwilling that it should be prosecuted", gives an indication of the fully discretionary nature of the procedure. English courts refused to inquire into the Attorney General's reasons for entering a *nolle prosequi* on the grounds that it was entirely a matter within the latter's discretion for which he would be accountable in Parliament. This theory has dominated the Canadian understanding of the Attorney General's role in criminal prosecutions, even in relation to the relatively recent statutory incarnation of the *nolle prosequi* which is found as the "stay of proceedings" in Section 579 of the *Criminal Code*. As will be mentioned below, there now appears to be developing a concept of judicial control over the abusive exercise of prosecutorial discretion based on Section 7 of the Charter of Rights and Freedoms. However, one cannot anticipate wholesale judicial interference with the English tradition of the Attorney General's broad discretionary control over the prosecution of offences.

The upshot of this tradition is that the Attorney General has the right to commence, control and/or terminate the prosecution of offences in accordance with his or her understanding of the public interest. Within the limits of the constitution and statutory provisions, the Attorney General is accountable in the exercise of this broad discretionary power not to the courts but to the legislature. The local Crown prosecutor, as will be described below, is the agent of the Attorney General in particular prosecutions. Moreover, unless bound by a statutory provision which states that certain actions can only be undertaken with the personal consent of the Attorney General, the local Crown prosecutor embodies all of the discretionary authority of the Attorney General in relation to the prosecution being undertaken as the latter's agent. The structure and control of the exercise of his prosecutorial discretion through local agents, both past and present, is a central aspect of this Commission's work.

1.1.2 The Early Colonial Period

While attending to political matters as members of the assembly and members of the government with other "portfolios" than that of justice,[4] the early Attorneys General often appeared in court to prosecute criminal matters personally.[5] When the Attorney General was not available or chose not to prosecute an offence himself, the task would fall to the Solicitor General (the Attorney General's "second in command"),[6] or, failing that, to Queen's Counsel or a barrister appointed either by the Attorney General or by the court where appropriate. This latter practice was particularly prevalent outside Halifax during Supreme Court assizes where, in the absence of an agent appointed by the Attorney General to prosecute offences, the presiding judge would appoint as prosecutor a senior counsel present at the sittings who would then seek remuneration and costs from the government and/or the convicted person.[7] This unstructured approach to the prosecution of criminal offences could be tolerated for at least two reasons: (a) Justices of the Peace along with local sheriffs processed minor offenders in a system which had scant regard for what would be regarded as basic procedural safeguards in modern times, and (b) the great bulk of criminal prosecutions for offences of intermediate levels of seriousness were carried out by private prosecutors, some of whom were entitled to public rewards or a portion of the fine imposed on convicted persons, and to costs in the event of a finding of guilt.[8]

1.1.3 The System of Regular Part Time Prosecutors

The climate of criminal law reform throughout the common law world in the third and fourth decades of the 19th century had an impact in Nova Scotia. Major reforms of Nova Scotian criminal law and procedure were enacted by 1841, at the same time as continuing settlement was forcing revision of administrative and curial jurisdictions.[9] County and town units became the basis for the administration of criminal justice in Nova Scotia and required little or no adjustment with the advent of Confederation in 1867.[10] However, as communities became more organized, hiring constables or creating police forces, greater reliance came to be placed in each area on public prosecutions by lawyers appointed for such purpose by the Attorney General.

This administrative structure for the public prosecution of criminal offences appears to have been put on a regularized statutory footing in 1887 when a duty was imposed upon the Attorney General "... to appoint some Queen's Counsel, or other competent barrister of the

4. Richard John Uniacke, the sixth and perhaps most famous of the early Attorneys General was for many years simultaneously Attorney General and speaker. See Brian Cuthbertson, "The Old Attorney General: A Biography of Richard John Uniacke", Nimbus Publishing, Halifax, 1980. The cumulated offices of other Attorneys General are described in Doull, *supra* footnote 1. Of course, the practice still continues.

5. Doull, *supra* footnote 1 at p. 122 describes Attorney General O'Hearn as having revived this practice in 1922 after a period of some 20 years where an Attorney General had not appeared personally to prosecute a criminal case. He also states that the practice was rare among O'Hearn's immediate successors, and is unknown for the most recent Attorneys General.

6. On the origins of the office of Solicitor General, see Edwards, Law Officers, *supra* note 2 at p. 119. For a concise description see Stenning, "Appearing for the Crown", *supra* note 2, at p. 89, as well as Professor J.Ll.J. Edwards, "Opinion on the Office of Solicitor General", presented to this Royal Commission.

7. For an excellent, though as yet unpublished, description of the mechanism of prosecution in early colonial Nova Scotia see Jim Phillips, "A History of the Nova Scotia Criminal Justice System: 1749-1841" on reserve at the Sir James Dunn Law Library, Dalhousie University, pp. 129-161. This system was still in effect in 1851 at the time of the publication of the Revised Statutes of Nova Scotia (First Series). In Title XII,Chapter 168 entitled "Of the Administration of Justice in the Supreme Court", sections 53-55 read as follows:
53. Whenever, in the absence of the Attorney General and Solicitor General, it shall appear to the court expedient and necessary to appoint any one counsel, to conduct and manage on behalf of Her Majesty, the proceedings and trial of any criminal prosecutions depending before the court, it shall be lawful for the court to direct any Queen's Counsel present therein, or, in his absence, to appoint from among the barristers attending thereat, some one competent person to conduct and manage such proceedings, and to tax and allow to him for his services such reasonable fees as he would have been entitled to for the like services as the attorney of any party in a civil action, together with such reasonable counsel fees, not exceeding for any one prosecution the sum of five pounds, as the court shall deem adequate to the services performed on such prosecution. But the costs to be taxed shall in no case exceed seven pounds and ten shillings for all writings and papers and for all counsel fees therein: and on the allowance and taxation the court shall not allow for any but necessary services and expenses, and notice of the time of taxation shall be given to the clerk of the Crown or his deputy.
(Continued on next page)

54. Upon the production of a certificate under the seal of the court of the amount so taxed and allowed, it shall be lawful for the Governor to grant his warrant therefor upon the Receiver General who shall pay the amount.
55. In all cases where the party prosecuted shall be convicted and be found by the court of ability to pay the expenses of prosecution, to be taxed under this chapter, the court shall adjudge such defendant to pay the expenses of prosecution, and shall issue execution accordingly, and the amount shall be paid to the Receiver General.

8. See Phillips, *Ibid.*, pp. 144-151.

9. *Ibid.*, pp. 174-199.

10. The apportionment of costs for prosecution of offences became a political issue as can be seen from the preamble to *An Act relating to the Administration of Criminal Justice in the Supreme Court*, S.N.S. 1887, c. 6.

11. *Ibid.*, Section 2.

12. *Ibid.*, Section 4.

13. *Ibid.*, Section 3.

14. See an act entitled *Of Appointment of Counsel for Criminal Proceedings*, R.S.N.S. 1900, c. 165, and S.N.S. 1905, c. 6 revising R.S.N.S. 1900, c. 165.

15. *Ibid.*, S.N.S. 1905, c. 6.

16. S.N.S. 1906, c. 4.

17. See, for example, R.S.N.S. 1954, c. 226, the *Prosecuting Officers Act*, which is virtually identical to the Act of 1900 as amended in 1905 and 1906. See Appendix 2.

18. S.N.S. 1960, c. 12, now R.S.N.S. 1967, c. 240. See Appendix 3 for the text of the Act.

court, to attend to the criminal business of each sitting of the Supreme Court in each county in the province on behalf of Her Majesty".[11] Thus, the system of judges appointing prosecutors was brought to an end, except in the absence of counsel appointed by the Attorney General[12] which, presumably, would be a rarity. In either event, however, the presiding judge was to "tax and allow to such prosecuting counsel reasonable fees for professional work done, not exceeding thirty dollars in any one case".[13] This system for handling prosecution of offences is reflected in the legislation in force until 1905.[14]

In 1905 and 1906, two changes occurred which are worthy of note. In 1905 the Act for appointment of counsel in criminal proceedings was amended to include the following section:

"The Counsel appointed by the Attorney General to conduct criminal proceedings in any county in Nova Scotia shall be known and designated as the "prosecuting officer", and have all the powers and duties provided for such an officer by the Criminal Law of Canada."[15]

This label "prosecuting officer" is still the official designation used by the Attorney General's Department, although under the influence of nomenclature employed in other Canadian jurisdictions the terms "Crown prosecutor" and "Crown attorney" are sometimes substituted by the general public and by many members of the legal profession in the province as well.

The second change, in 1906, is of far greater importance. In another amendment to the statute of 1900, the Attorney General was given the authority to appoint a prosecuting officer for "any city, town or county" who was to receive "such remuneration annually as may be fixed by the Governor-in-Council", and could only be removed "by the Governor-in-Council, on a report from the Attorney General".[16] It was this statute which laid the legislative basis for the system of regular part time Crown prosecutors which lasted until the creation of a partial full time prosecution service in 1966.[17]

1.1.4 The Introduction of a Full Time Prosecution Service

A new *Prosecuting Officers Act* came into force on July 1, 1960, and is still in force at the present time with no amendments having been made in the intervening period.[18] On its face, the Act seems to differ very little from the statute of 1900. The Attorney General may still "take charge of and conduct on behalf of the Crown the prosecution of criminals and any other criminal business" before any criminal courts in the province, although the time has long since

passed when anyone expects the Attorney General to do this regularly in person.[19] Similarly, the court is still given authority to appoint a prosecuting officer in the absence of an agent of the Attorney General, although it might be more likely now for a court to dismiss a charge in such circumstances for want of prosecution.[20] The key to the Act is found in Sections 3 and 5 which provide for appointment of "county prosecuting officers" and "assistant prosecuting officers" respectively to be paid an annual remuneration to be fixed "from time to time" by the Governor in Council. The legislative stage was thus set for the creation of the hierarchial administrative structure which we now see in the full time prosecution service of the province. The wording of the Act, of course, does not preclude the hiring of part time prosecuting officers, and indeed the full time service is presently supplemented in many areas by what are known as "per diem" prosecuting officers. (It is to be noted that the remuneration for per diem prosecuting officers is in the hands of the Attorney General alone by virtue of Section 10.)

The role of both "prosecuting officers" and "assistant prosecuting officers" (whether full time or per diem) is in formal legal terms identical; he or she "has all the powers, authorities and duties provided by the criminal law of Canada for prosecutors, or for prosecuting officers, or for counsel for the Attorney General".[21] The expression "criminal law of Canada" might be thought sufficiently broad so as to encompass provincial quasi-criminal legislation, but in the event that it is not, authority to prosecute provincial offences may flow from the *Summary Proceedings Act* of the province and other provincial legislation or from authority delegated by the Attorney General.[22] In the latter regard, Section 11 of the *Prosecuting Officers Act* is sufficiently important to merit citation in full:

(1) The Attorney General may prescribe the duties of prosecuting officers or of a prosecuting officer and may from time to time issue instructions to prosecuting officers, which instructions it shall be the duty of the prosecuting officer to observe and follow.

(2) In this section the expression "prosecuting officer" includes assistant prosecuting officers.

This section seems to settle one important issue and raise another. The issue which is put to rest is the claim made in some jurisdictions that Crown attorneys have common law powers independent of the authority of the Attorney General.[23] Section 11 makes control of Nova Scotia's prosecuting officers by the Attorney General complete, at least to the extent that instructions issued are not unconstitutional[24] or illegal. However, this section raises the issue of the "status" of the

19. *Prosecuting Officers Act*, Section 1.

20. *Prosecuting Officers Act*, Section 2.

21. *Prosecuting Officers Act*, Sections 5 and 6(2).

22. *Summary Proceedings Act*, S. N.S. 1972, c. 18 as amended.

23. In relation to this argument see: F. Armstrong and K. Chasse, "The Right to an Independent Prosecutor" annotation (1975) 28 C.R.N.S. 160-210 for a concise summary of this argument. For a critique of this argument see J.Ll.J. Edwards, "The Law Officers of the Crown", Sweet and Maxwell, London, 1964, Chapters 10 and 11, and Philip C. Stenning, "Appearing for the Crown: A Legal and Historical Review of the Criminal Prosecutorial Authority in Canada", Brown Legal Publications, Cowansville, 1986, Chapters 13 and 14.

24. See J.Ll.J. Edwards, "The Attorney General and the Charter of Rights", in Robert J. Sharpe (ed.) Charter Litigation, Butterworths, Toronto, 1987, at p. 45.

documents contained in the "blue binders" issued by the Attorney General to all prosecuting officers and assistant prosecuting officers. These are called "Advice to Prosecuting Officers" rather than "instructions" and their role as "mandatory" or "permissive" structuring of prosecutorial discretion will be an important issue discussed below.

One final aspect of the Act which deserves consideration is the provision in Sections 6 and 7 which makes possible the appointment of a special prosecuting officer "if there is a vacancy in the office of prosecuting officer, or if the prosecuting officer is for any reason unable or unwilling to act, or if for any reason the Attorney General considers it in the interest of the administration of justice to do so".[25] Special prosecutors are by the statute given "all the powers, authorities and duties of a prosecuting officer", although their appointment may be revoked at any time by the Attorney General[26] and they are paid fees prescribed by the Attorney General and approved by a departmental solicitor.[27] As one might think, such a section can be employed in a variety of politically sensitive circumstances, and recent examples of the appointment of such special prosecutors will be discussed below.

A final note on terminology is important here. The *Prosecuting Officers Act* refers to the agents of the Attorney General in the Province as "prosecuting officers", "assistant prosecuting officers" and "special prosecuting officers". Because of the technical meanings of these labels it would be incorrect to refer to the members of the Nova Scotia prosecution service in general as "prosecuting officers" since the phrase designates a particular class or rank of officers. Therefore, the terms "prosecutor", "Crown" and "Crown prosecutor" will be used throughout this study to refer to prosecutors in general. The phrases "prosecuting officer" and "assistant prosecuting officer" will henceforth be restricted to their technical usage under the Nova Scotia *Prosecuting Officers Act*.

25. *Prosecuting Officers Act*, Section 6.

26. *Prosecuting Officers Act*, Section 7.

27. *Prosecuting Officers Act*, Section 9.

1.2 The Structure and Administration of Nova Scotia's Prosecution Service

The structure and patterns of administration of Nova Scotia's prosecution service flow from the role of the Attorney General in Provincial Government. As stated earlier, the present statutory expression of the Attorney General's mandate provides that the Attorney General is responsible for the administration of justice within the province, and is the legal advisor to government. In 1981, a firm of management consultants reporting to the Deputy Attorney General set out its understanding of the mandate of the Attorney General.

Under the heading "administration of justice" were placed three sets of responsibilities:
(1) *law enforcement* (policing and criminal prosecutions),
(2) *courts* (judges of provincial magistrates court and administrative support for all courts), and
(3) *corrections* (institutional inspections, correctional programming and probation supervision).

Under the phrase "legal advisor to government" were placed:
(1) *solicitor services* (giving legal advice to government departments or agencies), and
(2) *civil litigation and criminal appeals*.[28]

28. Currie, Coopers and Lybrand Ltd., "Province of Nova Scotia Department of Attorney General: Development and Implementation of Revised Organizational Arrangements", a report submitted to Deputy Attorney General G.F. Coles, Q.C., December 1981.

By 1986 the Department, in order to carry out these functions, had been divided into four divisions, namely: the Legal Services Division, which provided departments with civil legal services and was responsible for criminal and penal law enforcement; the Correctional Services Division, which provided probation services to offenders and administered provincial correctional institutions; the Court and Registry Division, which administered the institutions indicated by its title; and the Administrative Services Division which provided administrative services to staff in all divisions.[29] Under this system, the Attorney General of Nova Scotia was responsible for at least four functions which in other commonwealth jurisdictions might be given to four ministers with separate departmental organizations and independent accountability to the legislature, that is:
(1) *prosecutions* (Attorney General and/or Director of Public Prosecutions),
(2) *advice to government* (Minister of Justice),
(3) *policing and corrections* (Home Secretary or Solicitor General), and
(4) *courts* (Lord Chancellor).
It is unclear whether close attention was given during the creation of the four division structure in 1986 to the possible conflicts of interest between the functions which have given rise in other jurisdictions to separate ministries.

29. Documents obtained pursuant to an interview with Mr. R.G. Conrad, Q.C., Executive Director of the Attorney General's Department on January 25, 1988 provide information on this structure.

For reasons which are not entirely clear,[30] an Order in Council was issued under the *Public Service Act* on December 3, 1987 which reorganized the governmental structure of the Province of Nova Scotia, and in particular announced the creation of a Department of the Solicitor General in addition to the Department of Attorney General. The relevant operative provisions of that Order in Council read as follows:

30. See the opinion of Professor J.U.J. Edwards to this Royal Commission on "The Office of the Solicitor General", February 2, 1988.

18. The Department of the Solicitor General is established and shall be presided over by the Solicitor General who has responsibility for the supervision, direction and control of affairs and matters relating to police and corrections and such other matters as may be assigned by the Governor in Council.

19. Affairs and matters relating to police and corrections which have heretofore been the responsibility of the Attorney General are assigned to the Solicitor General, and the Attorney General shall retain responsibility for affairs and matters relating to courts and prosecutions.

Thus the Correctional Services Division will be transferred out of the Attorney General's Department. The exact nature of these changes and any proposed legislative amendments which might be necessary to accomplish them have not yet been made public.[31] However, it is entirely possible that certain of the relations between Crown prosecutors and police discussed in this study may be affected by the proposed reorganization.

This study is concerned exclusively with what is now known as the Legal Services Division of the Attorney General's Department. Primary emphasis is placed on its present structure although it may be helpful to briefly describe its historical evolution with particular mention of the structure as it existed at the time of the trial of Donald Marshall, Jr. in 1971.

1.2.1 The Evolution of the Legal Services Division

In 1966 on the eve of the creation of a full time prosecution service, the legal staff of the Attorney General's Department consisted of eight people whose duties are described in a memorandum[32] from the then Deputy Attorney General Mr. J.A.Y. MacDonald to all members of his main office staff. There were no "divisions", as such, and the memorandum emphasizes that "... no rigid division is intended [by the assignment of work tasks] and that all professional members of the staff will be expected to maintain familiarity with the general work of the Department, and will be expected to consult each other on all major questions". The memo goes on to say that "... any member of the staff who is under temporary pressure will seek, and should receive, the assistance of others". Responsibilities in relation to criminal matters were allocated in the following manner:

"Mr. [Robert] Anderson: All Criminal Code matters including police reports and correspondence in relation to Criminal Code

31. An unedited departmental memo of Deputy Attorney General William MacDonald (obtained by the author in February of 1988) suggests that the shift of functions might take the following form:
Attorney General
Solicitor Services
Prosecutions
Fatality Inquiries Act
Courts
Registries of Deeds
Registries of Probate
Sheriffs
Public Trustee
Nova Scotia Legal Aid Commission
Expropriations Compensation Board
Public Utilities Board
- Gasoline & Fuel Oil Licensing Act
- Motor Carrier Act
- Salvage Yards Licensing Act
Registry of Joint Stock Companies
Securities Act
Horse Racing Commission
Marshall Inquiry
Criminal Injuries Compensation Board
Young Offenders
- prosecutions
Solicitor General
Correctional Services (Corrections Act)
Police Act (Police Commission)
Can/NS Agreement on Provincial and Municipal Police Services
Atlantic Police Academy
Liaison with RCMP and Municipal Police
Liaison with Canadian Security Intelligence Service (CSIS)
Representation to Police Chiefs Assoc.
Criminal Code*
- probation transfers (s. 739)
- wire taps
- firearms
- gun clubs
- Lieutenant Governor's Board of Review (s. 619)
Can/NS Agreement on Firearms (Prov. Firearms Office)
Block Parent Program
Young Offenders
- facilities
(Coordinate with Dept. of Community Services)
Regulations Act
*S.2 of the *Criminal Code* defines "Attorney General" as the Attorney General or Solicitor General of the Province in which ... proceedings are taken and includes his lawful deputy ...

32. This memorandum dated December 1, 1966 was obtained from Mr. R.G. Conrad, Q.C. present Executive Director of the Attorney General's Department and appears as Appendix 4 to this study.

matters with Prosecuting Officers and others, but not including appeals in indictable offences or Provincial Statute prosecutions; matters relating to the Departments of Municipal Affairs and Education, exclusive of summary conviction prosecutions under the Education Act."

"Mr. [Malachi] Jones: All matters relating to legislation, particularly proposed legislation and including final approval of all regulations originating within the Government; all appeals in indictable offences."

"Mr. [Gordon] Gale: Matters relating to the Department of Highways, including the Motor Vehicle Branch; matters relating to the Liquor Commission and the Liquor Licensing Board; the supervision of legal matters relating to Maintenance Orders; the licensing of gun clubs; divorce; and all actions and prosecutions under provincial statutes, including prosecutions under statutes administered by other Departments of Government."

It is to be recalled that at this time criminal prosecutions were in the hands of private practitioners paid on a per diem or retainer basis by the Government. Mr. Conrad reports that in the event that one of these outside prosecuting officers failed for some reason or another to appear in court for the day's proceedings, one of the eight members of the Attorney General's Department professional staff would rush to the court house to fill in.

After the hiring of full time prosecuting officers, and after the arrival of Mr. Innis MacLeod as Deputy Attorney General in 1971, a number of directorships were established to administer a growing department (by 1975 there were nearly 20 on the professional staff). Mr. J.W. Kavanagh became Director Civil, Mr. Robert Anderson became Director Criminal (later to be replaced by Mr. Gordon Gale), Mr. R.G. Conrad became Director Legal Administration and later Mr. Gordon Coles became Director Solicitor Services. Mr. Coles then replaced Mr. MacLeod as Deputy Attorney General, but the management structure did not change significantly until approximately 1980 when, with the death of Mr. Kavanagh, what had now become known as the Legal Services Division of the Attorney General's Department was divided into two directorates: civil under Mr. R.G. Conrad and criminal under Mr. Gordon S. Gale.[33] This was the form of organization which became the subject of the management study mentioned earlier.

As a result of the implementation of the management study, the Legal Services Division was given in 1986 the organizational structure which is currently in force.[34] There are four directorates:

33. Once again, this information comes from Mr. R.G. Conrad, who provided the organizational chart which appears as Appendix 5.

34. This structure is set out in Appendix 6, also provided by Mr. R.G. Conrad.

Criminal, Prosecutions, Solicitor Services, and Civil Litigation. Each has a director who reports directly to the Executive Director of the Department, Mr. R.G. Conrad. This study is most concerned with the position of Director (Prosecutions) since the incumbent of this position, Mr. Martin Herschorn, has responsibility for the direction of prosecuting officers. However, this study will also focus on the position of Director (Criminal) since it relates to cognate aspects of the administration of criminal justice, and since the incumbent, Mr. Gordon Gale, was under the arrangements from 1980 to 1986 the person through whom the Director (Prosecutions) reported.

1.2.2 Senior Management and the Direction of Prosecuting Officers

The senior managers most directly involved with the administration of criminal justice in Nova Scotia are the Director (Criminal) and the Director (Prosecutions). In theory and in practice the Executive Director, the Deputy Attorney General and the Attorney General stand higher in the administration so that their role in relation to prosecuting officers must also be kept in mind. However, as was mentioned above, the role of the Attorney General is the subject of a separate study for this Royal Commission undertaken by Professor J.Ll.J. Edwards.

(a) The Director (Criminal)

The position description for this role states that the Director (Criminal) is:

"... responsible for ensuring the proper application of the criminal law. This involves ensuring uniformity of application of the criminal law through appeal action, provision of advice on criminal law and enforcement policy to police agencies, provision of advice to prosecutors on appeal requests, and advice to the Attorney General on the effect of proposed or actual legislation on criminal law." [35]

From this description, one might gain the impression that the Director (Criminal) has little contact with prosecutors or police involved in the prosecution of particular cases. However, under the heading "specific accountabilities", the position description also states that the Director (Criminal) is "to advise police and prosecutors on specific investigations" and "to act as a resource person on criminal and police matters to other levels of government, the courts, police and prosecutors". An interview with the incumbent confirmed that giving advice to police and prosecutors in particular cases is a major part of the Director's responsibilities.[36] Moreover, the

35. Province of Nova Scotia, Position Description, Director (Criminal), dated November 4, 1985.

36. Interview by author with Mr. Gordon S. Gale, Q.C., January 29, 1988.

Crown Survey results indicate that prosecutors do indeed consult the Director (Criminal) widely in the exercise of their prosecutorial discretion.[37]

(b) The Director (Prosecutions)

The Director (Prosecutions) is the key figure in the administrative control of prosecuting officers exercised by the Department of Attorney General. The official position description of the Director (Prosecutions) is admirably complete and merits quotation at length to give a picture of his duties:

"The incumbent acts as advisor and resource person to all prosecuting officers and directs and supervises their activities. The incumbent ensures that all prosecutions are properly and competently conducted. Prosecuting officers faced with problems concerning evidence, procedure, substantive law or department policy seek guidance from the incumbent. The Director (Prosecutions) participates in decisions as to whether sufficient evidence exists to warrant a prosecution, or the nature of particular charges to be laid in a case. The incumbent also supervises when and in what circumstances a stay of proceedings may be entered by the Crown, thus suspending the progress of a criminal prosecution.

The Director (Prosecutions) advises the Attorney General on policies and directives to be issued to prosecuting officers, for example, respecting the Crown's position in the prosecution of cases arising out of family disputes or assaults. He monitors the progress of major prosecutions and deals on a regular basis with senior police officials in the Province.

The Director (Prosecutions) contributes to the professional development of prosecuting officers through supervision of their training, be it in house Department seminars conducted by the incumbent or through attendance at courses of continuing legal education. The incumbent evaluates the performance of prosecuting officers and identifies the need for future resource requirements. In most aspects of his activities, the incumbent maintains a close liaison with the Director (Criminal) to ensure continuity and consistency within the Division.

The incumbent is required to have a comprehensive understanding of the prosecution process and the court system in which it operates, together with substantial knowledge and competence in the fields of criminal law, procedure and evidence. In directing prosecutorial services in the Province, the Director (Prosecutions) has frequent

37. 11.9 percent of the respondents said they sometimes discussed plea negotiations with the Director (Criminal), though 38.1 percent said they rarely did and 50 percent said they never did. See Crown Survey, Question 31(b) results. Furthermore, in the open ended questions contained in Question 32 concerning whether prosecutors would seek advice on interim release, withdrawing charges, stays of proceedings, choice among multiple charges, and sentencing recommendations, the Director (Criminal) is frequently identified by position or by name. Similarly, the Director (Criminal) is identified by name several times in Crown Survey responses to Question 34 where he gave a particular direction or instruction which altered the prosecutor's conduct of a case.

contact with and provides assistance and information to Judges at all levels of courts. In addition to liaison with the Director (Criminal), the incumbent maintains regular contact with the Executive Director, Legal Services, the Deputy Attorney General and the Attorney General with respect to matters of policy and specific cases which are either under investigation or before the courts.

The Director (Prosecutions) also responds to complaints either from within the criminal justice system or from members of the public stemming from the actions of prosecuting officers or cases under investigation or prosecution. The Director (Prosecutions) together with the Director (Criminal), respond to most of the inquiries from the general public and the media concerning the criminal law, Department policy or particular prosecutions."

That the Director (Prosecutions) actively fulfills all of the functions listed in his job description is confirmed by a personal interview with the incumbent, Mr. Martin Herschorn[38], by a perusal of Mr. Herschorn's testimony at the public hearings of this Royal Commission[39] and through the Crown Survey results.[40] In particular, many of the prosecuting officers who responded to the questionnaire named him as a person consulted in relation to plea negotiation, interim release, withdrawal of charges, stays of proceedings, choice among multiple charges, sentencing recommendations, Sunday closing prosecutions, sufficiency of evidence for laying charges and complaints about proceedings.[41]

One of the most pervasive forms of "control" exercised by the Director (Prosecutions) over the exercise of prosecutorial discretion is through the standing instructions known as "Advice to Prosecuting Officers". Prosecuting Officers and Assistant Prosecuting Officers are issued with "Blue Binders" which contain a series of memoranda dealing with a variety of issues in the administration of criminal justice and in particular relating to the exercise of prosecutorial discretion. These "bits of advice" to prosecuting officers are supplemented and updated from time to time, and although the name of the Attorney General or the Deputy Attorney General may appear occasionally as the author of the instruction, most often it is the Director (Prosecutions).

A number of important observations must be made concerning these volumes of "Advice to Prosecuting Officers". They are regarded by the Attorney General's Department as confidential. They are not available to the general public as are the analogous documents in New Brunswick and Manitoba (though not those of other provinces), and they may not be available even to defence

38. Personal interview by the author with Mr. Herschorn, February 22, 1988.

39. Testimony of Mr. Martin Herschorn given before the Royal Commission on the Donald Marshall, Jr., Prosecution at Halifax.

40. Crown Survey results to Question 31(c) where 2.3 percent stated frequently discussed plea negotiation with the Director (Prosecutions), 18.6 percent said sometimes, and 44.2 percent said rarely. The most surprising figure may be that a full 34.9 percent said they never discuss plea negotiation with the Director (Prosecutions).

41. The Director (Prosecutions) is frequently identified by name or position as a person consulted in relation to these issues which are mentioned explicitly or via volunteered responses to open ended inquiries posed in Crown Survey Question 32.

counsel although they are widely circulated to many persons interested or involved in the administration of criminal justice. They are a kind of "open secret" which, though privately acknowledged by the Crown, cannot officially be used in public debate or during argument in criminal proceedings. This latter comment is related to the second observation concerning the "Advice to Prosecuting Officers", that being the assertion by the Attorney General's Department that the instructions are not mandatory, but advisory only. The advisory memoranda are said not to constitute an inflexible "binding" of prosecutorial discretion, but rather are said to be general advisory principles which must be adopted, adapted or rejected in accordance with the prosecutor's (or the Department's) professional judgment on the facts of each individual case.[42]

The ambiguous status of these documents is reflected in the way in which they are perceived by the respondents in the Crown Survey. Approximately 64 percent of those replying said they considered the directions in the loose-leaf volumes to be mandatory instructions while the other 36 percent felt they were not.[43] In commenting on this question some respondents noted that certain of the instructions are more specific than others and that those broadly drafted "enable a fair amount of individual discretion".[44]

One apparently disgruntled Crown made the following graphic remark:

"A lot of these instructions are someone in Halifax's way of covering his ass in the event a prosecutor screws up. If the prosecutor has not followed the appropriate direction he will be left twisting in the wind muttering that he did not think it was mandatory." [45]

While the imputation of these motives to the Departmental officials may or may not be valid, the perception indicates not only the confusion over the nature of the guidelines but the fact that the "advice" may operate unfairly to prosecuting officers to say nothing of accused persons.

A final factual observation about the "Advice to Prosecuting Officers" relates to their degree of completeness. While the Director (Prosecutions) may from time to time intervene in individual cases at his own initiative or upon the request of the prosecuting officer, one might think that all "standing orders" might be included as part of the "Advice to Prosecuting Officers". However, 51.3 percent of the respondents in the Crown Survey said they received other general instructions which were not included in the volume entitled "Advice to Prosecuting Officers". In the comment section on the questionnaire a range of persons giving such general instructions were mentioned: the Director (Criminal), the Director (Prosecutions),

42. This information is gleaned from discussions by the author with various participants in the Nova Scotia criminal justice system. This approach is argued to be consistent with administrative law principles which prohibit inflexible fettering of discretionary authority.

43. Crown Survey Results, Question 36.

44. Crown Survey Results, Comment on Question 36.

45. *Ibid.*

the Chief Prosecuting Officer for the County, and simply "officials of the A.G.'s Department".[46] The means used for conveying such information were said to include memoranda, letters, policy statements or guidelines and telephone calls. The latter situation is perhaps most likely in the case of per diem prosecuting officers to whom, according to the Director (Prosecutions) Mr. Herschorn, the "Blue Binders" are not usually sent.

The situation just described in relation to "Advice to Prosecuting Officers" can only be described as unsatisfactory from a number of points of view. Firstly, if openness and political accountability in relation to the exercise of prosecutorial discretion are appropriate values in a free and democratic society, the confidential nature of the guidelines is unacceptable. The people of Nova Scotia are entitled to know what general standards are being promulgated to structure the discretion of prosecutors. If the Attorney General is to be politically accountable in the legislature for prosecution policy in our criminal justice system, the "advice" generally given for the handling of typical situations ought to be freely available to the general public, the press and members of the opposition. Public debate on such important matters must not merely be tolerated but rather encouraged by those involved in making and applying such policy.

Secondly, the confidential nature of the guidelines may be prejudicial to the interests of certain accused persons. While the whole notion of prosecutorial discretion implies flexibility to deal with the particularities of individual cases, rules generally applied in typical cases must be made known to accused persons.[47] If an accused falls within or outside the norm to which the general policy applies, he or she is entitled to reasons why the prosecution views the situation as normal or exceptional as the case may be. To the extent that the exercise of prosecutorial discretion falls within the ambit of "fundamental justice" in Charter Section 7 or notions of equality under Charter Section 15, the matter of treating like cases alike and showing why different cases are in fact different may be a matter which is accorded constitutional protection.[48]

Thirdly, the present formulation of "Advice to Prosecuting Officers" is not adequate as a means of asserting effective control by the Director (Prosecutions) over the prosecutors under his direction. If the present loose-leaf binders of "advice" are an incomplete source of the general instructions governing the conduct of prosecuting officers, and if it is unclear to many prosecutors whether the "advice" is mandatory or not, clarification is required in the name of administrative efficiency.

46. Crown Survey Results, Question 37(b).

47. K.C. Davis, "Discretionary Justice: A Preliminary Inquiry", Baton Rouge: Louisiana State University Press, 1969.

48. For discussions of the impact of the Charter on the exercise of prosecutorial discretion, see: D.C. Morgan, "Controlling Prosecutorial Powers - judicial review, abuse of process and Section 7 of the Charter", [1987] 29 Crim. L.Q. 15-65; John U.J. Edwards. "The Charter, Government and the Machinery of Justice:, [1987] 36 U.N.B. Law Journal 41; Ian G. Scott, "The Role of the Attorney General and the Charter of Rights", [1986] 29 Crim. L.Q. 187.

These deficiences could be rectified by the implementation of the following recommendation.

Recommendation 1

That the volume entitled "Advice to Prosecuting Officers":

(a) be revised and updated, in consultation with the Crown prosecutors, so as to constitute a complete statement of the general instructions governing the prosecution of Criminal Code *and other statutory offences in the Province;*

(b) be drafted in such a way as to clarify the extent to which prosecuting officers are "bound" by the precepts therein contained;

(c) be published and made available to the general public through the Nova Scotia Government Bookstore; and

(d) be sent to all prosecuting officers, including per diem prosecuting officers.

(c) Policy Development, Planning and Systems Management

Discussions with senior personnel of the Attorney General's Department during the initial research, which were confirmed during the consultation process, revealed that a virtually complete absence of a policy making and planning capacity is the most serious single administrative problem for the Department and for the administration of criminal justice in Nova Scotia. Although the Director's (Criminal) job description indicates that he has responsibility in relation to law reform initiatives, he admits that pressures from other responsibilities prevent him from discharging this function adequately. The Director (Prosecutions) has attempted to give guidance to prosecutors through the Blue Binders of "Advice to Prosecuting Officers", but states that his time is monopolized by dealing with management of day to day problems in prosecution. Under such circumstances, he is unable even to undertake the revision necessary to create a truly adequate manual for use by prosecutors. While the present system does have in place certain requirements for Crowns to fill in "performance indicators" which provide some statistics on how prosecutors use their time, there is simply no one in the present management structure who has time to perform basic evaluative functions of an administrative nature, let alone anything approaching a full review of prosecutorial policy.

The direction of a modern prosecution service is a complex undertaking which requires a sophisticated blend of systems management and policy development. The manner in which the prosecution service is structured and controlled will have an impact upon policy development and implementation. Conversely, the type of policies adopted for the administration of criminal justice in general, and prosecution in particular, will have an impact on the way in which the prosecution area of the Attorney General's Department should be structured. The public hearings and research undertaken by this Commission have revealed serious problems with both the management structure and prosecution policy of the Attorney General's Department. Some of these will be addressed during the course of this study in the pages which follow. What is clear from this study is that as presently constituted, the upper administrative echelons of the Attorney General's Department are not organized in such a way as to respond to these problems. There is no organized, internal capacity for policy development, planning and systems management.

Given this state of affairs, it is essential that senior management be strengthened by the addition of a position which might best be labelled Director (Criminal Justice Policy Development), who would have a modest staff working with him or her. Such a person could be responsible for the drafting and updating of the revised "Advice to Prosecuting Officers", for developing policy initiatives in relation to general problems in the administration of criminal justice, and for dealing with criminal law reform proposals whether they might originate within the provincial sphere or from other governmental bodies or from the public. The creation of such a position would leave the Director (Criminal) to concentrate on appeal issues and other problems of a day to day nature in the administration of criminal justice free from the "law reform" responsibility. It would leave the Director (Prosecutions) at liberty to deal with day to day prosecution problems as well as the implementation of performance evaluation standards and management controls, without the worry of a primary responsibility for policy development. The Director (Criminal Justice Policy Development) would certainly have to work closely with the Director (Criminal) and the Director (Prosecutions) in order to draw upon their day to day experience to ensure that policy development occurred with a clear understanding of everyday practical difficulties. Moreover, such a person should make him or herself available for consultation in policy development with members of the prosecution service "in the trenches", as well as with public interest groups having concerns about criminal justice policy.

Any proposal concerning a management position under the name Director (Criminal Justice Policy Development) ought to be viewed

as essential, regardless of what other improvements in administrative structure are contemplated. In particular, the creation of a statutorily independent office of "Director of Public Prosecutions" to ensure a prosecution service which is insulated from improper political interference ought not to be viewed as in conflict with the creation of policy development capacity. The issue of structured responses to the perceived problem of political interference with the prosecution process will be addressed below. But regardless of what solution is adopted in relation to it, the Attorney General's Department, with or without a D.P.P., will require a policy development capacity if the administration of criminal justice in the province is to be placed on a more rational organizational foundation. Finally, it is important to recognize that this position ought to be devoted exclusively to criminal justice policy. On July 18, 1988 the Attorney General announced the creation of a general policy advisor position. Such a general officer's duties would be too broad to adequately meet the need for policy development in the criminal law area. Therefore the following recommendation is proposed.

Recommendation 2

(a) That there be created within the Attorney General's Department a senior management position entitled Director (Criminal Justice Policy Development); and

(b) That the responsibilities of the Director (Criminal Justice Policy Development) include:

(i) The revision and publication of the "Advice to Prosecuting Officers";

(ii) The development of general policies to cope with problems in the exercise of prosecutorial discretion and the administration of criminal justice; and

(iii) The development of law reform proposals, including responses to law reform efforts originating with other levels of government or from the general public.

1.2.3 The Corps of Prosecuting Officers: A Profile

It will be recalled that the *Prosecuting Officers Act* (Appendix 3) authorizes the appointment of Prosecuting Officers and Assistant Prosecuting Officers for each county in the province and provides for the possibility of Special Prosecuting Officers in particular circumstances. While these ranks and geographical divisions are important elements in the structure of the Prosecution Service in the

province, there is an overlap of administrative categories, both geographical and in terms of rank, which is equally important to describe for an understanding of the system. This profile will describe firstly the geographical distribution of prosecuting officers, and secondly will describe the administrative classifications and the appointment process in relation to Crown prosecutors. It will close with a brief assessment of the failure to appoint and assign prosecuting officers in relation to specialized functions for different types of prosecutions.

(a) Geographical Distribution of Prosecution Services

There are 18 counties in Nova Scotia, for each of which has been appointed a Prosecuting Officer under the *Prosecuting Officers Act*. For each of these counties there are also several Assistant Prosecuting Officers. There are 16 Prosecuting Officers and 40 Assistant Prosecuting Officers in the employ of the Attorney General's Department in one fashion or another. However, only Halifax County operates by having virtually all prosecuting officers working solely within that county and under the direction of the Prosecuting Officer for that county. The Prosecuting Officers in the rest of the province are grouped into three regions for administrative purposes. Thus there is an Eastern Region comprised of Cape Breton, Inverness, Richmond and Victoria counties; a Central Region comprised of Antigonish, Colchester, Cumberland, Guysborough and Pictou counties; and a Western Region composed of Annapolis, Digby, Hants, Kings, Lunenburg, Queens, Shelburne and Yarmouth counties. To make matters terminologically more complex, Halifax County is called Halifax Region and is subdivided into the areas of Halifax, Bedford, Dartmouth and Sheet Harbour (see Appendix 7). The designation of prosecuting officers by county began, as mentioned earlier, in the 18th and 19th centuries when county units developed as the form of government by which to raise taxes and administer services of which courts and jails were important examples. The full time prosecution service needed in the 1960's had to be administered in the context of a system where counties were only one form of important municipal unit, where a greatly expanded range of government services were being offered by the Provincial Government, where modern transportation and communications made 19th century county boundaries redundant, and where the earlier and more even population distribution among counties had been skewed by the urbanization of Nova Scotian society.

In the face of the inability or unwillingness of successive governments to create a rational municipal structure in the province (such as that recommended by the Graham Royal Commission on Municipal Government),[49] the Department of Attorney General has created an *ad hoc* rationalization using the statutory and jurisdictional tools at hand. Within each of the regional administrative units outside Halifax, the norm is for each prosecutor to be appointed to more than one position within the region. For example, in the Western Region the Prosecuting Officer for Annapolis County is also named as an Assistant Prosecuting Officer in Hants and Colchester counties, and the Prosecuting Officer for Digby County is named as an Assistant Prosecuting Officer for Annapolis and Yarmouth counties. These complex assignments are reflected in the Orders in Council and statutory proclamations by which Prosecuting Officers are appointed. The permutations and combinations of appointments of prosecutors of different ranks to different counties is set out in the organizational chart found in Appendix 7.

There is a clear tension between the county-based and region-based geographical systems. The region-based system allows for the sharing of scarce personnel and for a more flexible response to the scheduling of trial assignments. When long and complex trials draw off personnel predominantly assigned in one county, these people can be replaced by others from counties where the current case-load is less demanding. On the other hand, the system of county-based statutory responsibility does not allow for the creation of a rational and coherent hierarchial structure within which to delegate responsibility and accountability. The organizational chart found in Appendix 7 shows lines of authority and accountability flowing from each county from Prosecuting Officer directly to the Attorney General's Department through the office of Director (Prosecutions). This is in accordance with the *Prosecuting Officers Act* which in Section 3 states that "the Attorney General shall appoint for each county a barrister to take charge of and conduct" criminal prosecutions on behalf of the Crown, and in Section 10(1) which states that the Attorney General "may from time to time issue instructions to prosecuting officers, which instructions it shall be the duty of the prosecuting officer to observe and follow". The county-based system is highly decentralized with each Prosecuting Officer reporting directly to the Attorney General's Department. It is unlikely that the Prosecuting Officer for one county, when acting as an Assistant Prosecuting Officer in another county under the regional scheme, is likely to receive or willingly respond to orders from the Prosecuting Officer for the second county.

49. Graham Royal Commission Report and the Future of Halifax and Dartmouth, Institute of Public Affairs, Dalhousie University, 1975.

Table 1
Administrative Classification and Appointment Process

	Prosecuting Officers	Assistant Prosecuting Officers
OIC	11	38
CSC	5	16
Full Time	14	27
Part Time	2	2
Per Diem	0	25
Total	**16**	**54**

There is no effective scheme of regional hierarchial control with delegated authority whereby all county Prosecuting Officers report to a chief Prosecuting Officer for the region who then reports to the Director (Prosecutions). When every one of the 16 county Prosecuting Officers feels that he (there is no she) has direct access to the Director (Prosecutions) and/or the Director (Criminal), it is not surprising that there are problems of administrative congestion. One might expect bottle-necks in communication with those "up-the-line" on the one hand, and a monopolization of Departmental Director's time in the grinding detail of individual prosecutions, leaving little time for policy formulation and effective over-all management.

The administrative control of Crown prosecutors in Nova Scotia is one which is virtually bereft of the benefits which flow from effective middle-level management; top-level management in such circumstances comes to feel besieged with trivia, while those in the trenches are deprived of effective guidance. The following recommendation should be adopted in order to improve the administration of criminal justice in the province.

Recommendation 3

(a) That the incipient system of regional administration of Prosecuting Officers be recognized in the statutory allocation of responsibilities among prosecutors; and

(b) That a system of Chief Prosecuting Officers for each region be adopted in order to create an effective middle level of management in Nova Scotia's prosecution service.

(b) Administrative Classifications and the Appointment Process

While the *Prosecuting Officers Act* speaks of Prosecuting Officers, Assistant Prosecuting Officers and Special Prosecuting Officers, there are other administrative classifications which are equally important for the shaping of the province's prosecution service. Whether the prosecutor is hired on a full time or part time basis, whether he or she is paid on a fixed salary or a per diem fee, and whether he or she is appointed by Order in Council or to a civil service position are all important variables. The generality of the wording of Sections 3, 5, 8 and 9 of the *Prosecuting Officers Act* makes possible these varying arrangements which are summarized in Table 1.[50]

Of the 16 Prosecuting Officers, 14 are full time while two are part time, and none are paid on a per diem basis. The two part time

50. The information in this Table comes from Appendix 7 which was provided by Mr. R.G. Conrad, Q.C., Executive Director, Legal Services Division.

appointments are in the Eastern Region, and both incumbents act as Prosecuting Officers in one county and Assistant Prosecuting Officers in another. The full time/part time division presumably ought to reflect the fact that the volume of prosecutions in the areas for which these appointments are made does not warrant the expense of a full time Prosecuting Officer. Of the 54 people who have the status of Assistant Prosecuting Officer under the *Prosecuting Officers Act*, one half are part time prosecutors (including 25 per diem prosecutors and two salaried part time prosecutors) and the other half are full time. According to the Director (Prosecutions), the part time Assistant Prosecuting Officers are employed to handle overload situations when full time staff are fully occupied.[51] Such assignments would be made by the Prosecuting Officer for the county from the list of Assistant Prosecuting Officers in the region who have valid appointments for the appropriate court.[52]

Until very recent changes in policy to be described below, the appointment of Prosecuting Officers in Nova Scotia has reflected the two track system prevalent in the hiring of employees for many areas of Nova Scotia government service. Some government jobs are designated as civil service positions, the hiring process (to be described below) is handled by the Civil Service Commission, and the appointees have the status of civil servants under the *Civil Service Act*.[53] Other government jobs do not have the civil service designation, and people are appointed through Orders in Council with the status of "public servants" but not "civil servants".[54] As Appendix 7 shows, all of the prosecutorial positions in the province are designated as either civil service positions (marked CSC for Civil Service Commission) or Order in Council positions (marked OIC). Of the 16 Prosecuting Officer positions only five are designated as civil service positions while 11, including the two part time appointments were made by Order in Council. Among the 54 Assistant Prosecuting Officers, only 16 are civil service positions while the remaining 38 including 11 full time positions, two part time positions and all 25 per diem positions are filled by Order in Council (see Table 1).

There has been a certain degree of public speculation concerning the extent to which the appointment of Prosecuting Officers is the result of partisan political associations rather than merit. In particular some people are of the view that the Order in Council process may be more susceptible to such abuse than the Civil Service Commission process. Those in government, however, justify the use of Order in Council appointments on the grounds of administrative efficiency, pointing to the length of time it takes to fill a Civil Service Commission appointment. In order to address this issue it is necessary to describe the two hiring processes in some detail. The

51. Interview with Mr. Martin Herschorn, Director (Prosecutions), February 22, 1988.

52. This information provided by Mr. Herschorn is confirmed, at least in part by Crown Survey Results to Question 8(a) and 8(b).

53. *Civil Service Act*, S.N.S. 1980, c. 3, s. 36.

54. *Public Service Act*, R.S.N.S. 1967, c. 255.

following description is based in large part upon discussion with Mr. R.A. MacDonald.[55]

When a vacancy occurs in a prosecuting position designated as "civil servant", Management Board approval is sought to appoint a replacement. If approval is received, notification is sent to the Civil Service Commission along with a job description, and the Commission advertises the vacancy. Advertising has traditionally taken the form of "blue sheets" distributed to government offices, posted in court houses and placed with federal "Manpower" offices. Newspaper advertising has not normally been conducted.[56] Applications received by the Civil Service Commission are forwarded to the Personnel and Payroll section at the Attorney General's Department. They are then sent to the Director (Prosecutions) who sets up an interview board composed *inter alia* of departmental people working in the criminal law area and a Prosecuting Officer. This Board makes a recommendation to the Deputy Minister who makes a further recommendation to the Attorney General. The Attorney General has the final say in the decision, and will make the appointment in accordance with the *Prosecuting Officers Act*.[57] There is nothing to prevent anyone in the Attorney General's Department from adding names to the list received from the Civil Service Commission, and appointments may in theory be made by the Attorney General without reference to the Civil Service Commission list. Once an appointee is named, his or her qualifications are sent to the Civil Service Commission for rating according to what is popularly known as the "Hay System" and a salary level will be fixed accordingly. This salary is then communicated to Cabinet by a "report and recommendation". An Order in Council will then emanate from Cabinet officially stating the appointee's annual salary pursuant to Section 8 of the *Prosecuting Officers Act* and designating the person as an employee in the civil service pursuant to Section 36 of the *Civil Service Act* with all customary benefits of employment to which civil servants are entitled. The whole procedure is said to take approximately one and one-half months.

A vacancy in a full time or part time Order in Council position is brought to the attention of the Personnel and Payroll section of the Attorney General's Department, and is discussed by the Director (Prosecutions), the Executive Director of the Legal Services Division, the Deputy Attorney General and even the Attorney General. Names of those persons who have made inquiries to the Department, the nature of the position, and names of suitable candidates known to be potential candidates are discussed. Someone is designated to contact a person sought to be hired, and the name of the proposed appointee is sent to the Personnel and Payroll section

55. Interview by the author with Mr. R.A. MacDonald, Executive Director, Administration and Finance, on February 23, 1988.

56. But see "Chronicle Herald", May 6, 1988. There appeared an advertisement for two positions.

57. The form of appointment used appears as Appendix 8.

which prepares a "report and recommendation" for Cabinet. This "report and recommendation" is sent simultaneously to Cabinet and to Management Board. Management Board will make its opinion known, and Cabinet will then make its own decision as to whether an appointment will be made. If given the green light, the Attorney General will then appoint the person in accordance with Section 4 or 5 of the *Prosecuting Officers Act* (see Appendix 8). Then the Governor in Council may simply set out in an Order in Council the remuneration for the office in accordance with Section 8 of the *Prosecuting Officers Act*, or in addition designate the position as that of an employee for the purposes of the *Public Service Superannuation Act* or even to give the person the benefits, excepting tenure, of the *Civil Service Act*.[58]

58. This information can be seen in purged examples of Orders in Council provided to the author by the Department of Attorney General, March 8, 1988.

In comparing these procedures for appointing prosecutors as "civil servants" or "public servants" it can be seen that there is greater flexibility and hence room for partisan political considerations in relation to Order in Council appointments. The appointment process for "OIC's" is less public, and the terms and conditions of employment are not necessarily tied to the classifications for salaries, pensions and benefits which are generally imposed upon "civil servants". However, even with the civil service appointee, the critical moment in the hiring process is the decision of the Attorney General which might or might not be motivated by partisan considerations.

The Crown Survey is only moderately helpful in providing information on this issue. Of the seven Civil Service Commission appointees who answered the question "was the position advertised", two said it was, five said it was not and one didn't know, although a majority thought a competition was held. Two said they were hired without an interview.[59] Perhaps the only inference which can safely be drawn from this data is that even civil service position hiring practices over the years have not been uniform. However, it does not give comfort to those who might wish to deny the possibility of politically partisan hiring practices for civil service positions. Among the 36 Order in Council respondents to the Crown Survey, five said their initial appointments had been converted to civil service positions.[60] When asked to explain why they were appointed by Order in Council rather than by the Civil Service Commission, seven respondents said they didn't know and a number said, understandably enough given the OIC/CSC designations, that it was the nature of the vacancy. Two forthright respondents answered in a way which indicates that political considerations were relevant in their cases. One of these said he or she was contacted by a "local Tory" when the vacancy occurred, and another said simply that he or she was a "political appointee".[61]

59. Crown Survey Results, Question 6(a) and (b).

60. Crown Survey Results, Question 6(c)(i).

61. Crown Survey Results, Question 6(c)(iii).

62. Information derived by the author from Mr. William MacDonald, Deputy Attorney General, in a telephone conversation of May 18, 1988.

Since the Crown Survey was conducted, the present Attorney General has moved in the direction of fundamentally altering the system of appointing full and part time prosecutors.[62] It is now departmental policy that all vacancies are to be filled via the Civil Service Commission route, and the newspaper advertisement for two positions which appeared on May 6, 1988 in at least one Halifax newspaper is an indication of the new approach. In addition, Management Board has approved the conversion of all present Order in Council positions to Civil Service positions with the intention that these changes be formally carried out in the near future. This development, while it may slow the appointment process, is one which the Royal Commission ought to heartily applaud as a necessary step toward removing the taint of political patronage from the administration of criminal justice in Nova Scotia. Further recommendations on this issue will be discussed in Part 2, below.

Appointment of Assistant Prosecuting Officers on a per diem basis has traditionally been in the hands of the Attorney General's Department. Recommendations concerning a need for part time assistance are said to be received by the Department from "the field" often with recommendations concerning suitable available barristers. If these recommendations are acted upon, an appointment is made by the Attorney General in the statutory format (Appendix 8) and per diem rates are established by the Attorney General's Department pursuant to Section 9 of the *Prosecuting Officers Act*. The present standard rate is $300.00 per day. This practice is not affected by the recent changes in policy concerning the appointment of full time prosecutors or part time prosecutors who receive an annual salary.

Table 2
Salary Classifications of Crown Prosecutors and/or Solicitors

	Minimum	Policy	Maximum
Intake Level *(MCP 15)*	$31,549.00	$39,436.00	$41,013.00
Solicitor/Prosecuting Officer, Level I: 2 Yrs Experience *(MCP 20)*	$36,782.00	$45,977.00	$47,816.00
Solicitor/Prosecuting Officer, Level II: 4 Yrs Experience *(MCP 24)*	$42,404.00	$53,005.00	$55,126.00
Solicitor/Prosecuting Officer, Level III: 6 Yrs+ Experience *(MCP 26)*	$45,307.00	$56,634.00	$58,900.00

63. Information received from the Department of Attorney General via the Department's counsel at the Royal Commission, Mr. Darrel I. Pink, by letter of May 18, 1988.

(c) Qualifications and Salary Levels

Crown prosecutors, like departmental solicitors, are classified by the Attorney General's Department in four different levels for purposes of remuneration. There is the initial "intake level", and then Levels I, II, and III according to years of experience at the Bar. For each level there is a maximum and a minimum salary set, as well as a normal mid-range called "policy". These salary levels are summarized in Table 2.[63] It is to be noted that promotion to any level is upon recommendation to and approval of the Deputy Attorney General.

Table 3
Actual Average Salaries for Civil Service Commission and Order in Council Appointments
(Broken down by levels of experience and classifications of prosecutor and assistant prosecutor.)

Yrs of Experience as N.S. Prosecutor	Order in Council	Civil Service Commission
0-2	Prosecutor: $31,549.00 *(Actual #:1)* Assistant Prosecutor: n/a *(Actual #:0)*	Prosecutor: $46,440.00 *(Actual #:1)* Assistant Prosecutor: $36,481.66 *(Actual #:3)*
2-4	Prosecutor: $46,645.00 *(Actual #:1)* Assistant Prosecutor:$49,838.00 *(Actual #:2)*	Prosecutor: n/a *(Actual #:0)* Assistant Prosecutor: $38,621.00 *(Actual #:1)*
4-6	Prosecutor: n/a *(Acutal #:0)* Assistant Prosecutor: $46,064.66 *(Actual #:6)*	Prosecutor: n/a *(Actual #:0)* Assistant Prosecutor: $43,678.00 *(Actual #:1)*
6+	Prosecutor: $57,135.25 *(Actual #:8)* Assistant Prosecutor: $52,669.75 *(Actual #:4)*	Prosecutor: $58,333.66 *(Actual #:3)* Assistant Prosecutor: $53,299.33 *(Actual #:9)*
Key	1. Actual # of OIC Prosecutors: 10 2. Actual # of OIC Assistants: 12	1. Actual # of CSC Prosecutors: 4 2. Actual # of CSC Assistants: 14

64. Information received from Mr. R. A. MacDonald, Executive Director, Finance and Administration, Department of Attorney General.

The general salary classifications, in principle, are said to apply to Civil Service Commission appointees and to Order in Council appointees. Table 3 sets out the actual average salaries for civil servants and for Order in Council appointments broken down by appropriate levels of experience.[64] The categories identified in Table 3, of course, are no longer strictly applicable since Order in Council appointments are being converted to civil service appointments. While this Table does show what might be thought patterns of imbalance between junior or recent appointees and long term employees (whose salaries are very low), it does not confirm the idea that Order in Council appointees get a "sweet-heart deal" on salary - particularly in the long run.

Salary classification levels do not necessarily correspond to job description classifications used by the Civil Service Commission in hiring and for other administrative purposes. Appendix 9 is a position description for an "Assistant Crown Prosecutor (Prosecuting Officer IV)", and it refers to Prosecuting Officers I through V, the last of which is a "Prosecuting Officer" for a county as defined under the *Prosecuting Officers Act*. All other levels of "Prosecuting Officer" referred to in this position description are in fact gradations of "Assistant Prosecuting Officers" as defined in the *Prosecuting Officers Act*.

The position description provided in Appendix 9 is a very complete, if perhaps somewhat flattering, description of the Crown prosecutor. It represents the "ideal", in a certain way, and is therefore worthy of careful study since it can usefully be compared with the information received in the Crown and Defence Surveys as to how the position of Assistant Prosecuting Officer works in practice. It is unfortunate that the Attorney General's Department was unable to provide a similar job description for the position of "Prosecuting Officer" - or what in administrative terms might be called a

"Prosecuting Officer V". A comparison of the two 'ideal types' might have been instructive.

(d) Specialization

One fact which becomes apparent when examining a profile of the present prosecution service within Nova Scotia is the absence of any specialization of functions. While Prosecuting Officers, particularly in larger offices, may have more administrative responsibilities than other prosecutors, the prosecutorial responsibilities of Prosecuting Officers and Assistant Prosecuting Officers relate to all *Criminal Code* and provincial statutory offences. Appeals in indictable matters are handled by a specialized group working out of the Attorney General's Department in Halifax, but otherwise all prosecutors may find themselves prosecuting any and all offences.

Section 6 of the *Prosecuting Officers Act* does provide for the possibility of appointing a "Special Prosecuting Officer", but this is usually used in situations where there is a perceived conflict or bias between the interests of a regular Prosecuting Officer or the Department and one of the parties to the proceeding. Recent examples include the appointment of a Special Prosecuting Officer to handle charges against a senior official of the Attorney General's Department, or to conduct a fatality inquiry where there was a potential allegation of police wrong-doing.[65] These appointments may take the form of appointing a regular member of the prosecutorial staff from one county to do a particular case in another for which his normal appointment is not valid, or may involve the appointment of a barrister who is not regularly employed as an agent of the Attorney General for the purposes of prosecution. In any event, appointment of these "Special Prosecuting Officers" is not intended to address the problem of specialization of function which is the concern here.

In certain other Canadian jurisdictions there are special prosecutions units which handle particularly complex trials such as large-scale commercial fraud, or may handle difficult cases which may raise politically sensitive issues.[66] In either case, to pull a prosecutor out of his or her normal daily routine and make an assignment to a long case requiring particularly intense preparation, may cause disruption to the regular operation of a particular prosecuting office. For these and related reasons the Attorney General's Department of Nova Scotia has been considering the creation of such a special prosecutions unit.

Because of the obvious interest in such a scheme, both the Crown and Defence Surveys contained the following question: "Do you think there ought to be a 'special prosecutions unit' in the Attorney General's Department which would prosecute particularly complex

65. Information received from Mr. Martin Herschorn, Director (Prosecutions) in a telephone conversation with the author, May 18, 1988.

66. These jurisdictions include Manitoba, Alberta. See Appendix 19 for the Manitoba Guidelines on their provinces' Special Prosecutions Branch. Consultants Chase and Rosenberg also state that variations on such units have been employed in Ontario.

67. Crown Survey Results, Question 47(b).

68. Defence Survey Results, Question 21(a).

or sensitive cases?" Of the Crown prosecutors who responded, 57.5 percent said yes,[67] compared with 60 percent of the defence counsel who said yes.[68] Conversely, 42.5 percent of Crowns said "no" while 33 percent of defence counsel said "no" with six percent of the latter saying "it depends". These figures are not terribly significant in and of themselves, but they take on meaning when read in the light of the open-ended follow up question which asked respondents to give reasons for their answers.

Eight of the Crowns who favoured a "special unit" thought it would avoid the appearance of bias or political interference in sensitive cases, while a larger number favoured it on the grounds that complex cases need special treatment beyond the normal capacity of the system as presently organized. One of the latter specifically stated it would be wrong to do it because of perceptions of bias if it were used for politically sensitive cases. Twenty-three defence counsel who answered "yes", thought that a special prosecutions unit was necessary to overcome public perceptions of political bias in the administration of criminal justice. Specific mention was sometimes made of the MacLean, MacIsaac, MacDonald, Barrow and Thornhill investigations. Some defence counsel would prefer the use of ad hoc special prosecutors in such circumstances while others advocate a D.P.P. model. Only six defence counsel thought that the complexity of certain prosecutions warranted the creation of a specialized unit.

Among the Crowns who advised against the creation of a special prosecutions unit their reasons were quite diverse. Some thought ad hoc special prosecutors would be adequate to handle cases where the Department's regular counsel might be thought biased, and others were of the view that there are no "complex" cases - just bigger ones that any competent Crown ought to be able to handle. The largest group (six respondents) thought that the creation of a special prosecutions unit, particularly for cases involving partisan politics would in itself create a perception of bias and that the principle of "equal treatment" would prohibit such a development. Similarly, defence counsel who opposed the idea did so for a variety of reasons. Some oppose what they perceive as elitism, some think that a good prosecutor should be able to handle any case, and others would prefer the de-politicization of the senior levels of the Attorney General's Department sometimes via the creation of an independent D.P.P. model of prosecution.

This study will give separate consideration below to the issue of partisan political interference in the prosecution of offences. What is at issue here is the matter of whether specialized expertise when pooled in a special administrative unit would lead to more efficient prosecution of complex and perhaps "small 'p' political" cases. The evidence of perceptions among Crown and defence counsel in the

surveys is divided. However, a significant minority of Crown counsel think that such a specialized group would be of value.

Consultants have indicated that the Ontario experience with a special prosecutions unit has been a mixed blessing for morale in the prosecution service. An elite corps of "specialists" can easily become seen as an arrogant and condescending group having no greater expertise than their colleagues, but having the privilege of picking the best and most interesting cases out of the system for their own treatment. An open system of promotion to such a group, based on merit, as well as a system for rotating junior prosecutors from the ranks for training and exposure with it might provide the means for the development of a healthy and respected special prosecutions unit. One can assume that, on the basis of experience to date in Nova Scotia, a special prosecution unit's primary focus would be on commercial fraud.

Recommendation 4

(a) That careful consideration be given to the creation of a specialized prosecution unit composed of senior and experienced counsel who would be assigned to the prosecution of complex cases, the prosecution of which might cause problems if handled by regular administrative units;

(b) That leadership in such a specialized prosecution unit come from senior and experienced prosecutors chosen on the basis of merit; and

(c) That the unit be used for training junior members of the prosecution service on a rotational basis.

1.2.4 Working Conditions and Morale of Prosecutors

There was no comprehensive effort made during the preparation of this study to visit prosecutors' offices or interview prosecutors about working conditions. However, through the Crown Survey, newspaper reports and casual interviews, information on working conditions and morale was obtained. This information will be presented in relation to salary and workload, physical facilities, relations with management, prospects for advancement and general morale.

(a) Salary and Workload

Some insight into the workload of Crown prosecutors can be gained from Crown Survey results [69] when broken down by rank and full time/part time status. All eight Prosecuting Officers who responded said they spent more than 30 hours per month in court with the majority (five) spending between 30 and 40 hours per month in court on average. For one the figure stood between 50 and 75 hours and for two it was over 75 hours per month in court. Of the 19 salaried Assistant Prosecuting Officers only four spent less than 20 hours per month (presumably part timers), and the rest spent more than 30 hours. The per diem officers, as one would expect, spent proportionately less time in court doing prosecutions. For half of them it was less than ten hours per month and, unlike the full time staff, none reported spending more than 75 hours per month in court on prosecutions. Another cross-tabulation of this data indicated that the average time spent in court by prosecutors overall did not vary significantly for those practicing in jurisdictions of less than 40,000 people and those of over that figure.

Another indicator of workload can be derived from responses in the Crown Survey relating to trial preparation. Only 26 percent of the Crowns said they frequently interviewed witnesses prior to the day of the trial, while 45 percent said they sometimes did and 29 percent admitted that they rarely or never did. When asked under what circumstances or in relation to what offences they would interview witnesses prior to the date of trial, most said in "serious" cases and others gave examples of sexual assaults or where witnesses were children. One complained that there was "no time for preparation" and "no staff to contact witnesses", while another said that as a per diem he or she usually only got the file the day before going to court.

The data in the Crown Survey on time spent in court and trial preparation seems to confirm impressions generally held by those associated with the administration of criminal justice, that the full time Crowns, while on the whole not terribly over-worked, spend a reasonably high percentage of their time in court. They are generally conducting cases which are not given a great deal of pre-trial preparation, largely because of the high volume of less serious cases where putting time in on pre-trial preparation simply cannot be justified in relation to other time-pressures.

Data on salary ranges and average incomes for the varying categories of prosecutors was presented earlier. However, the Crown Survey results show that 71 percent of the respondents were of the view that their income as prosecutors was inadequate while 29 percent thought it was adequate.[70] In comments, the respondents stated most frequently that they could make more in private practice.

69. Crown Survey Results, Questions 4(b) and 2 and cross-tabulated.

70. Crown Survey Results, Question 41(e)(i).

One of the few who indicated that the remuneration was adequate said his "wife works"! Another said survey results indicate that salaries in Nova Scotia may be as much as 30 percent lower than some other provinces. A frequent comment from per diem prosecutors was that the $150.00 per half day or $300.00 per day was extremely low, particularly since it applies only to time spent in court - no payment is made for preparation even though it must be done.

While firm conclusions on the limited data above ought not to be drawn, there is evidence to suggest that Crown prosecutors in the province are working reasonably hard and being underpaid. Given this perception, recruitment of top personnel and the ability to maintain a high standard of expertise will be adversely affected. The Department must review its salary levels to see if they are competitive.

Recommendation 5

That the Attorney General's Department conduct a review of its salary levels in order to ensure that high calibre, dedicated personnel may be attracted to and retained as members of the province's prosecution service.

(b) Physical Facilities and Support Staff

There can obviously be no uniformity in working conditions where some Prosecuting Officers work out of their own private offices and others work in Crown offices which may be in court houses or in other buildings. In response to the question "Do you consider working conditions in your jurisdiction adequate?", 68 percent of respondents to the Crown Survey said yes, 29 percent said no and two percent said "it depends". When broken down geographically, those working in jurisdictions of under 40,000 people had a slightly greater tendency to find their conditions adequate (79 percent) than those working in areas of over 40,000 (58 percent said they were adequate).[71] But the question framed in that way is very general, and one must turn to the examples given in comments for a flavour of prosecutors' reasoning.

Even among those who said their working conditions were adequate, one complained of poor ventilation as did numerous respondents who said the conditions were inadequate. Several complained their offices were too small, one saying that he or she could not adequately interview witnesses when only three people could fit in the office.[72]

71. Crown Survey Results, Question 41(g)(i).

72. Crown Survey Results, Question 41(g)(ii).

Several of the unhappy respondents complained of inadequate secretarial and administrative support. This complaint may be supported by some respondents in the Defence Survey who complained that they had difficulty getting copies of witness statements and items from the Crown file. Often defence counsel have to review the file with a dictaphone in hand because the Crown office is unwilling or unable to provide photocopies.

The unevenness of physical working conditions, and of support staff is a matter of serious concern. A modern prosecution service ought to have the capacity to carry out its functions properly. It would seem that underfunding is chronic in certain areas and there is no coherent system by which to evaluate adequacy of levels of physical environment and personnel support. The Executive Director, Administration and Finance admitted while being interviewed that someone in a local prosecuting office who complained enough and made the right budget requests at the right time might eventually get some redress, but that the system was not even. While absolute uniformity is neither possible nor desirable, this situation requires improvement.

Recommendation 6

That the Attorney General's Department budget in the areas of improvement to physical facilities and support staff be reviewed and increased where necessary to provide adequate physical facilities and support staff according to more uniform standards across the whole prosecution service.

Research facilities available to Crown prosecutors also vary considerably across the province. The librarian with the Attorney General's Department attempts within a very limited budget to provide Crown prosecution offices with a "minimum working collection" which can be supplemented by loans from the Department's central library in Halifax.[73] The size of the "minimum working collection" depends in part upon the degree of access which local prosecutors may have to a local Barristers' Society Library or to a judge's library. The Department normally provides a prosecutor's office with "Martin's Annual Criminal Code", McWilliams on "Canadian Criminal Evidence", Ewaschuk's "Criminal Pleadings and Practice in Canada", and standard texts on breathalyzer offences and the *Young Offenders Act*. Each office also gets the "Weekly Criminal Bulletin", the "Nova Scotia Reports", the "Canadian Criminal Cases", the Statutes of Nova Scotia, and office consolidations of the *Motor Vehicle Act* and the *Lands and Forests Act*. The offices in Truro and Sydney have the "Canadian Charter of Rights Annotated" and the Bridgewater and Liverpool offices are also getting some

73. The following description is largely based upon an interview with Marie DeYoung, Librarian, Department of Attorney General, on February 23, 1988.

Charter material. Consideration is being given to providing offices with "Crankshaw's Criminal Code" and Nadin-Davis' "Sentencing in Canada", but the librarian fears that office staff support is so inadequate that these loose-leaf services will not be kept up to date properly, thus wasting the investment in them.

In the Crown Survey, 64 percent of respondents said they thought research facilities were adequate, while a corresponding 36 percent thought they were not.[74] Of those who said they were adequate and added comments most referred to the local Barristers' Library and the excellent assistance of Marie DeYoung, the Department's Librarian. Another said "time to do research is minimal due to work and demands". Of those who were displeased with research facilities, many said local facilities are poor or do not exist, although once again many recognized that the Halifax library of the Attorney General's Department was very helpful with requests.

74. Crown Survey Results, Question 41(f).

By modern standards of criminal law research, the research tools and facilities provided to most prosecutors in Nova Scotia are appallingly primitive. It seems equally shocking that most prosecutors surveyed seem unaware of this. Dramatic action should be taken on this front, since the quality of criminal justice in the province depends in large measure on the quality of legal argument which is presented to the courts. Traditional research tools, by which is meant statutes, case reports, digests and text books must be readily available to all Crown prosecutors. In addition, it is essential for the Department of Attorney General, perhaps in conjunction with the provincial Legal Aid Commission, to explore the possible establishment of a central, computerized legal research facility. The Research Facility of the Ontario Legal Aid Plan provides a useful model for possible emulation in this regard. Advocates of the Ontario Legal Aid Plan system argue that specialized computer researchers are able to improve the efficiency and reduce the cost of legal research.[74(a)] Law students across the country are currently being trained in the use of computerized legal data bases, so that the creation of such a system may be a practical and cost effective means by which to bring the Nova Scotia prosecutor's research capability into the 20th century sometime before its end.

74(a). See Ken Chasse, Director of Research, Ontario Legal Aid Plan, "The Research Facilities' System of Legal Research in 1988".

Recommendation 7

(a) That the Attorney General's Department take immediate steps to upgrade the research facilities of local Crown offices to ensure that basic texts, case reports and digests relevant to the prosecution of offences are available;

(b) That training in use of recent research tools be a part of a regular process of continuing professional education for Crown prosecutors; and

(c) That the Attorney General's Department investigate the establishment of a computerized research facility for the Nova Scotia Prosecution Service, possibly in connection with the Nova Scotia Legal Aid Commission.

(c) Relations with Management

Under this heading it will be useful to examine the ways in which prosecutors relate to their immediate superiors, the way in which they relate to the Attorney General's Department, and the way in which prosecutors are evaluated by the Department.

The general instructions given to all prosecutors via the "Advice to Prosecuting Officers" has been discussed earlier. When discussing relations with supervisors, the focus here is on job assignments and particular instructions. The Crown Survey asked how prosecutors were assigned to particular courts. The most frequent response was that this was done by the Prosecuting Officer of the county, although many said "whatever file you pick up you follow to complete". This indicates the variety of management styles one might expect in a system running from small rural offices to major urban ones. Fully 48 percent said they were always or at least frequently consulted in this kind of assignment and a further 36 percent said they sometimes were. Only 16 percent said they rarely or never were consulted.[75] This may be some indication that in local matters there is a cooperative or reciprocal approach to certain forms of decision-making, although there may be substantial variance from this general rule in particular instances.

On participation in policy matters a different picture appears. The Crown Survey asked "Are you given an opportunity to provide input in relation to departmental policy covering the way in which you exercise prosecutorial discretion or carry out your duties?" Only 35 percent answered yes to this question, and a corresponding 65 percent answered no.[76] However, status must be taken into account when interpreting these figures. Per diem Prosecuting Officers are not invited to the annual meeting of prosecutors which was most often mentioned by the positive respondents as the way in which this policy input occurs. Thus, that 11 out of 14 per diem officers answered that they had no input should not be surprising. However, the efficacy of a one day annual meeting as a means of providing policy input is questionable on its face, and may help explain why 13 out of 19 salaried Assistant Prosecuting Officers replied they had no

75. Crown Survey Results, Question 8.

76. Crown Survey Results, Question 40(a).

input into policy. As one might expect, in a situation where senior field personnel ought to be consulted by management in head office, the majority of Prosecuting Officers said they had input. What is surprising is that two out of seven who responded to the question said they had no input.

Departmental officials ought to be encouraged to consider whether at present they are effectively utilizing the resources of their Crown prosecutorial service in elaborating policy, and whether some departmental processes of consultation other than the annual meeting ought to be put in place. This function may be served to some extent in other jurisdictions by a Crown prosecutor's association. Until very recently no such provincial organization existed in Nova Scotia, and it has been publicly suggested that the former Deputy Attorney General opposed membership by his prosecuting staff in the Canadian Association of Crown Prosecutors on the grounds it was akin to unacceptable unionization.[77] If this was indeed the Department's attitude, things appear to have changed. An organization entitled the "Nova Scotia Government Lawyers Association" has been established, with the apparent blessing of the Department, which is open to "all persons employed by the Provincial Government who hold a current practicing certificate in the Nova Scotia Barristers' Society."[78] It is obviously too early to tell whether this organization will serve as a means by which the Department may consult with Crown prosecutors on matters of policy affecting both their work and the administration of justice within the province. However, the potential is now there and the Department should be encouraged to take advantage of it.

The issue of evaluation strikes at the heart of the employer/employee relationship, particularly in a context where employers are called upon to exercise independent professional judgment. The Department has a system of what are called "results indicators" where prosecutors are required to keep statistics on time in court, number of guilty pleas, et cetera.[79] These are resented by some prosecutors, who clearly feel that these statistics may reflect poorly on those whose "volume" is low because they are involved in complex cases or are generally doing better preparation than others. On the other hand, the Director (Prosecutions) states that these results indicators are not used, indeed are unusable, for evaluation of individual performance. They are merely intended to provide the Department with some basic statistics on what is happening in the criminal justice system in the absence of an adequate national data collection system.

Departmental evaluation of individual performance is to be done via the Provincial Government's performance appraisal system which is part of its Management Compensation Plan (M.C.P.). The form

77. "Crown Lawmen unhappy say ex prosecutors", Cathy Nicoll, "The Daily News", Halifax, April 22, 1988.

78. The group had its organizational meeting, coordinated by Mr. Martin Herschorn, the Director (Prosecutions) and by Mr. David Thomas, the Chief Prosecuting Officer for Halifax County, on June 4, 1988. A circular from Mr. Thomas, as President of the Nova Scotia Government Lawyers Association, dated August 18, 1988, was sent to persons eligible for membership.

79. See the "Advice to Prosecuting Officers", for a full statement of the system.

used by this system, as partially completed, for evaluating prosecutors is found in Appendix 10. This system is used for salaried employees only, and not for part time prosecutors. Nevertheless, all Departmental officials interviewed were of the opinion that this system is not properly adapted for the evaluation of Prosecuting Officers. This skepticism of the top level management may explain its sporadic implementation since its inception in the wake of the "Hay" study.

The absence of an adequate system of evaluation is of considerable concern to many of the respondents to the Crown Survey. Of the salaried employees who responded, three of the eight Prosecuting Officers felt they were not being evaluated and fully half of the 14 Assistant Prosecuting Officers said they were not being evaluated.[80] Since there is no formal system for evaluating per diem Prosecuting Officers, it may seem odd that two out of the 11 who replied thought they were evaluated. There seems to be some complacency about the present state of affairs since 60 percent said it was appropriate, while 36 percent said it was not, and four percent said it "depends". Many felt the senior Crown in the county was scrutinizing their work, but many said they had no idea whether there was any evaluation going on at all.

80. Crown Survey Results, Question 39.

Among those who expressed concern about the absence of an adequate means for evaluation there was a strong sentiment that merit was not being rewarded. One comment stated:

"For practical purposes my view is that there is no meaningful evaluation of my performance as a prosecutor. There is no accurate correlation between ability and salary or promotion."

Another comment along the same vein is as follows:

"New assistant prosecutors are given inadequate training and direction. There is no supervision worth mentioning, our direct supervisors view our abilities on the basis of whether we are personally liked. As a result poor employees are thought highly of and good employees become frustrated and often leave."

Even if these comments are not widely shared, and even if they relate to a minority of the prosecution offices in the province, they are a matter of great concern. These comments are also helpful in that they point out the relationship between evaluation, training and promotion or professional advancement. These latter topics will be addressed briefly before recommendations are proposed to respond to this interrelated set of problems.

(d) Prospects for Professional Training and Advancement

Of the Crown Survey respondents over 88 percent had LL.B. degrees from Dalhousie Law School, the rest being educated in a variety of institutions. Less than ten percent had an LL.M. The major refresher course available in Canada for criminal lawyers is the annual Criminal Law course put on by the Federation of Law Societies of Canada. Of the 41 Crown Survey respondents who answered the question, 63 percent said they had never attended this course, although over 50 percent said they had sometimes or frequently attended provincial Continuing Legal Education Conferences.

The Director (Prosecutions) regrets the small portion of the budget earmarked for attending conferences. It allows only two to four people per year to attend the Federation refresher course depending upon its location. This may only be a different way of expressing the view of one Crown survey respondent who said simply: "The Attorney General's Department is very reluctant to spend money for conferences." One respondent said he or she had applied every year (for the past 12) but had been refused each time. Virtually all of the full time prosecutors are said by the Director (Prosecutions) to attend the Attorney General's Department fall meeting for prosecutors. Given the lack of research facilities available to prosecutors, and the unavailability of funds to send Crowns to the Federation of Law Societies' refresher, more frequent in-house continuing professional education programs appear to be essential.

Aside from the fact that there is little Departmental support for continuing professional education, there may be little incentive either. The structure of the prosecution service, described earlier, gives little opportunity for advancement. Despite the pay levels and the Civil Service Commission categories, there are only two grades of prosecutor: Assistant Prosecuting Officers and Prosecuting Officers. If there were regional offices and a specialized prosecution unit where promotion was based on merit, there might be greater incentive to demonstrate sound performance in order to move through the system. The prosecutors' ambiguous responses concerning career prospects showed through in the Crown Survey. The question was asked as to whether respondents considered their jobs "career positions", and 76 percent said yes.[81] When asked what other career goals they had in mind, 50 percent of the respondents did not answer. Of those who did, however, 38 percent were considering private practice, 19 percent looked forward to appointment to the bench, 19 percent thought they would like to move up through the Attorney General's Department, 14 percent had other law related jobs in mind and ten percent wanted to get away

81. Crown Survey Results, Question 3(b).

from law altogether.[82] These figures might be interpreted somewhat speculatively as showing a relatively high degree of job satisfaction among a majority of prosecutors, with a small, and perhaps ambitious, minority seeming quite dissatisfied.

82. Crown Survey Results, Question 3(c).

(e) General Morale

Many of the observations in the subsections above on working conditions are born out by the general comments made by Crown Survey respondents in the questions on general morale. When asked to describe their own morale in relation to their work, 74 percent said it was positive, 19 percent were indifferent or neutral and seven percent were negative.[83] When broken down by rank it turns out that all Prosecuting Officers are positive about their jobs as are 68 percent of the Assistant Prosecuting Officers and 71 percent of the per diems. The same trend showed through when respondents were asked to describe the morale of prosecutors in general, although people seemed to think that their colleagues were somewhat more negative than they were themselves.[84]

83. Crown Survey Results, Question 41(a).

84. Crown Survey Results, Question 41(b), with the same trends on cross-tabulation by rank as reported for Question 41(a), above.

Interesting results show through when these questions on general morale are cross-tabulated for geographical distribution. Of the 21 respondents in jurisdictions of under 40,000 inhabitants no one was negative about their work and only three people reported themselves to be indifferent.[85] On the other hand, of the 19 prosecutors in jurisdictions with a population of over 40,000 five were indifferent and three negative. Although fewer prosecutors were willing to rank their colleagues, the same trends show through - there is a greater tendency for people in smaller towns than in larger to think of their colleagues as positive about their morale, even if not as positive as they themselves.

85. Crown Survey Results, a cross-tabulation of Question 41(a) and Question 41(b) with variation of community size was done.

The results to these questions on general morale show what might be thought to be a very high degree of positive commitment by prosecutors to their work. The comments to the open-ended questions may provide some measure of explanation for this. Among those who reported themselves to be positive, some said the work was interesting, satisfying and challenging. It is fascinating to note, however, that the most common comment from the positive respondents was that they were far enough away from Halifax that they could carry on without interference. The smaller office and the degree of autonomy exercised by the rural Crown prosecutor seemed to provide a high level of job satisfaction. Those who were negative or indifferent or at least saw their colleagues being so, criticized heavy workloads, poor pay, absence of staff, laziness of supervisors, poor research facilities, limited opportunities for advancement and a feeling that their efforts were not being appreciated. It is hard to

resist the conclusion that it is the urban prosecutor who is far less happy than his or her rural colleague.

One of the interesting aspects of this data is the relationship between workloads, autonomy and supervision. The apparent lack of rigourous supervision and/or evaluation in the rural setting, where workloads may not be as heavy, seemingly leads to a sense of liberty and professional satisfaction. In urban areas with heavy workloads some Crowns, at least, seem resentful that when unsupervised and poorly evaluated they cannot demonstrate the degree to which they are hard done-by. One suspects that it is also these urban Crowns working in the large offices who view themselves as without prospects for advancement.

The following recommendation is drafted with a view to the problems of evaluation, professional training and professional advancement which were addressed in the previous subsections.

Recommendation 8

(a) That the Attorney General's Department establish a working group to develop a computerized system of data collection in relation to the criminal justice system in the Province so as to create the capacity to monitor and evaluate the performance, cost and efficiency, not only of the prosecution service, but also of other key aspects of the justice system;

(b) That the Attorney General's Department establish a coherent program of continuing professional education, in consultation with rank and file members of the prosecution service, through which to familiarize personnel on an organized basis with new developments in the law and evolving professional standards of competence and ethical responsibility; and

(c) That in the course of implementing the structural changes in the administration of the prosecution service contemplated in recommendations 2, 3, 4, 7(c) and 22, there be established a rational system of promotion based on merit through a career path which will satisfy a good prosecutor's need for recognized professional advancement.

Part 2
The Exercise of Prosecutorial Discretion in Nova Scotia

Part two of this study is intended to be a descriptive and proscriptive analysis of the exercise of prosecutorial discretion in Nova Scotia focussing on the role of the local Crown. The issues to be examined include the role of the Crown at the investigative stage, the locus of the decision to prosecute, the nature of and mechanisms for disclosure, plea negotiation, the conduct of the trial itself, and the problem of partisan political interference with the administration of criminal justice. To accomplish all this in relatively brief compass is a tall order. However, the approach will be to analyze Nova Scotian practice and then refer to doctrinal advances and law reform proposals in a variety of jurisdictions so as to derive policies and procedures appropriate for reforms, where necessary, in Nova Scotia. The general approach in relation to each issue will be to set out the law or policy as it is thought to apply currently, describe the Nova Scotian practice in fact as it has been revealed in the research conducted for this study, and to make proposed recommendations for improvements in the law, policy or practice as the case may be.

2.1 The Role of the Crown at the Investigative Stage

The Nova Scotia Attorney General's Department and, to a lesser extent, local Crown prosecutors have traditionally had considerable involvement at the investigative stages of the criminal process. This involvement may be categorized under two broad headings:

(i) influence on general police policies relating to law enforcement and deployment of police resources; and
(ii) giving advice and procedural assistance to police in the investigation of particular offences.

As has become apparent, the Attorney General's Department will now share some of these functions with the Department of the Solicitor General. However, each will be discussed in turn.

2.1.1 The Crown Role in Police Enforcement Policy

Police in Nova Scotia, as elsewhere in Canada, have imposed upon them broad statutory duties to maintain and enforce the law.[86] The municipal police forces in the province operate pursuant to the *Police Act*,[87] and the RCMP operate pursuant to the *RCMP Act* [88] and a contract with the Nova Scotia Government which makes the RCMP the provincial police force for municipalities which do not have their own police organization. However, in carrying out their broad duties in law enforcement the police are generally subject to the control of the provincial Attorney General, Solicitor General, or Minister of Justice under the authority given to the provinces in Section 92(14)

86. See Philip C. Stenning, "Legal Status of the Police", a Law Reform Commission of Canada Study Paper, Ministry of Supply and Services, Ottawa, 1981, as well as the study undertaken for this Royal Commission by Richard Apostle and Philip C. Stenning, "Public Policing in Nova Scotia", August, 1988.

87. *Police Act*, S.N.S. 1974, c. 9.

88. *RCMP Act*, R.S.C. 1985, c. R-10.

of the *Constitution Act, 1867*. Dickson, J. (as he then was) of the Supreme Court of Canada has described this latter authority in the following terms:

"Law enforcement is primarily the responsibility of the provinces and in all provinces the Attorney General is the chief law enforcement officer of the Crown. ... Among [his responsibilities] within the field of criminal justice, are the court system, the police criminal investigations and prosecutions and corrections. The provincial police are answerable only to the Attorney General as are the Crown Attorneys ...[89]

89. *Di Iorio and Foutaine v. Warden of the Common Jail of Montreal et al.* (1976), 8 N.R. 361 (S.C.C.).

Just how these general responsibilities will now be divided among Solicitor General and Attorney General in Nova Scotia has not been made clear. However, the approach adopted by the Attorney General's Department can be described briefly.

General issues concerning strategies in crime control, the deployment of police resources and the treatment of certain classes of crimes or offenders arise from time to time in the Attorney General's Department. Examples provided by the Director (Prosecutions) are the proper response to situations of family violence, appropriate forms of police cooperation in campaigns against drinking and driving, the distinctions between situations of careless driving as opposed to criminal negligence in the operation of a motor vehicle, and the implementation of new legislation such as the reform of sexual offences. These and like matters might be the subject of the weekly "Thursday morning meeting" between the top officials of 'H' Division of the RCMP and top management of the Department usually including the Director (Criminal), the Director (Prosecutions) and sometimes the Deputy Attorney General. The Director (Prosecutions) describes these sessions not as ones where the Attorney General's Department gives orders to the RCMP as provincial police, but rather as attempts to arrive at mutually satisfactory solutions or approaches to the problems at hand. The results of these discussions are then communicated to RCMP officers in the field by internal RCMP memoranda or orders. The Attorney General's approach to municipal police forces appears to be more in the line of superior officer to subordinates. Municipal police chiefs are informed of changes in Departmental policy by memoranda from the appropriate Departmental official. In fact, a perusal of the Blue Binders of "Advice to Prosecuting Officers" will reveal that many of the instructions therein are directed to Prosecuting Officers *and* municipal police chiefs.

In the Crown Survey, prosecutors were asked how often they initiated contact with local police concerning general policies of law

enforcement and the prosecution of offences. Five prosecutors, or 12 percent, said they did so frequently, 36 percent said they sometimes did, and 52 percent said they did so rarely or never.[90] Some said this was not their responsibility, and one emphasized that this was particularly the case now that he or she was a per diem Prosecuting Officer. Others, perhaps the Prosecuting Officers in the survey, said regular meetings with police forces were held and were useful in "airing complaints and making suggestions for a better working relationship". Still others listed as part of their discussions with police the kinds of issues also mentioned by the Director (Prosecutions) as forming elements of the policy discussions held with the RCMP in the Thursday meetings, *i.e.*, ensuring consistency in dealing with certain types of procedures (second offence drunk drivers, breaches of probation, alternative measures, disclosure to defence counsel, search warrants, spousal assaults and impaired driving investigations).

The general picture which emerges from the data in the Crown Survey indicates, at least in principle, an appropriate relationship between policy and practice. The major policy decisions in law enforcement matters are said to be made in the Attorney General's Department (for pragmatic reasons, in consultation with the major police force), and these policy decisions are then conveyed through appropriate channels for implementation. These directives are then followed up with consultation at the local level between key Prosecuting Officers and local law enforcement personnel.

90. Crown Survey Results, Question 13(a).

2.1.2 Investigation of Individual Cases

The investigation of individual crimes is primarily a matter for police forces which carry out their duties without direction from prosecutors. In relation to complex or unique circumstances, however, the investigative process will involve a cooperative effort between police and Crowns. In a complex case police will sometimes seek the assistance of the Crown in drafting and applying for a search warrant, obtaining a wire-tap authorization or securing commission evidence from another jurisdiction. In such cases Crown prosecutors will be apprised of the nature of the case and will be asked their opinion on whether such investigative procedures are necessary in order to gather sufficient evidence to present a successful case in court. The Crown Survey asked prosecutors how often the police contacted them regarding the investigation of offences prior to the laying of a charge. The results show this is a commonplace occurrence. Thirty-three percent of the respondents said this happened frequently, and 35 percent said sometimes.[91] Only 33 percent said rarely or never, and one might speculate as to whether

91. Crown Survey Results, Question 12(a).

per diems predominate in this group. Advising police in investigations would thus seem an important part of the local Crown's work. Very often the issue is the sufficiency of the evidence, and it is usually the investigating police officer or constable who makes contact with the Crown prosecutor.[92]

The Crown Survey also directed questions to respondents to determine whether *they* rather than the police initiated the investigative process on occasion. A surprising 33 percent said that they sometimes request that the police conduct investigations which might lead to the laying of a criminal charge. Only 26 percent said they never did this, while 42 percent said it happened on rare occasions.[93] The volunteered comments indicate that the most frequent cause of such prosecutor initiated investigations is a call from a private citizen alleging the commission of a crime, sometimes after a perceived inadequate response from police. Other instances include perjury allegations and situations where Crown sheets or police reports seem to indicate the commission of crimes other than those charged. It appears from this data that Crown prosecutors may fill a useful back-up role in the investigative process in dealing with cases to which the police might not otherwise respond.

As might be expected prosecutors also cause police investigations to be revived where a charge has been laid and the prosecutor is of the opinion that more proof is required in order to obtain a conviction. Seventy-two percent of the respondents in the Crown Survey said this happens sometimes or even frequently, while only 28 percent said it rarely or never occurs.[94] If the per diems are over-represented in this latter group it can be assumed it is a regular occurrence for full time Crowns. The most frequently cited examples of a Crown's request for further investigation were the interviewing of additional witnesses, getting more precise statements from witnesses, and getting photographs or measurements from the scene of the crime.

While the above sketch of relations between the investigating officer and the local Crown conducting the prosecution falls within the normal range of what anyone experienced in the criminal justice system might expect, it is important to note the officials in the Attorney General's Department will often have involvement with individual investigations as well. A local Crown frustrated by an uncooperative police investigator may complain to the Director (Criminal) or the Director (Prosecutions). The Marshall case shows fascinating instances of both prosecutors and police officers appealing to the Department in Halifax for support of their positions. When this occurs it is seemingly because something significant is at stake, and it is at this stage that the public needs to be assured that the advice given and decisions taken are in accordance with

92. Crown Survey Results, Questions 12(b) and (c).

93. Crown Survey Results, Question 14(a).

94. Crown Survey Results, Question 15(a).

professional standards of objectivity, free from the slightest taint of partisan bias. The public furor over the Marshall case as well as the celebrated instances of Thornhill, MacLean and MacIsaac, indicate that public confidence in this area has been seriously eroded - justifiably or not.

General policy concerning standards governing police investigation may now be thought properly to be within the purview of the Solicitor General's authority, although this might be a matter for disagreement. Clearly, there will be a need for the Solicitor General and the Attorney General to cooperate in policy development in this area. A policy statement, along the lines of the following recommendation, might help both police and prosecutors in the discharge of their respective responsibilities.

Recommendation 9

(a) That in the investigation of offences prior to the laying of charges, it is understood that police officers are to carry out their legal duties in accordance with general standards, practices and policies established by the Solicitor General, but in consultation with the appropriate agent of the Attorney General where any particular investigation would be thought to benefit thereby; and

(b) That after the laying of charges, police shall carry out any investigations in accordance with the instructions of the Attorney General or appropriate prosecutor with a view to preparation of the case for presentation in court.

2.2 The Decision to Prosecute

The decision to prosecute is fraught with implications and repercussions not only for the accused persons or victims who feel immediately affected but also for society's notions of fairness and justice in the widest sense.[95] In a democratic society where maintaining the rule of law and preventing abuse of power may depend upon an adequate system of public checks and balances among powerful governmental agencies, it is important to distinguish between the authority to lay charges in the first instance and the authority to ensure that they be subsequently carried forward only in the public interest. In making this distinction it is important to keep in mind as well that the decision to prosecute involves two fundamental questions:

(i) is there sufficient evidence to prosecute? and
(ii) would a prosecution be in the public interest?

95. See the Law Reform Commission of Canada, Working Paper #55, "The Charge Document in Criminal Cases", Ottawa, 1987, pp. 3-14, for a brief discussion of charging and the history of criminal proceedings.

2.2.1 Laying Charges: Citizens, Police and Prosecutors

While police officers have general law enforcement duties pursuant to the *Police Act*[96] and have special powers of arrest granted by virtue of Section 495 of the *Criminal Code*,[97] police status with respect to the laying of criminal charges is no different from that of any other citizen.[98] *Criminal Code* Section 504 provides, in part, that "*Any one* who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice ..." (emphasis added).[99] This section enshrines the common law right of the ordinary citizen to commence a private prosecution regardless of the wishes of the authorities. As such it has been viewed as a protection against official tyranny on the one hand and a safety valve against private vengeance on the other.[100]

It may also be argued that this section protects the common law tradition of police independence, whereby it is the duty of the police constable to enforce the law and in maintaining this duty the police are answerable to the law alone and not to the Attorney General or any other minister of the Crown.[101] Given that the *Criminal Code* is a federal statute, the claim may also be made that Section 504 is a matter of criminal procedure beyond the legislative authority of the provinces to modify, such that any provincial attempt to limit the freedom of police officers to lay criminal charges is unconstitutional. Support for this approach can be found in statements from the Supreme Court of Canada,[102] although there is a clear tension between this point of view and that of Mr. Justice Dickson in the *Di Iorio* case cited earlier. The policy rationale underlying this system is based on the notion of checks and balances alluded to above. The police have the duty to exercise their judgment in accordance with the law, and without interference from the Crown. If the Attorney General or his agent disagrees with the police judgment in the matter, the proper course is not to prohibit the police from laying charges. Rather it is to wait until the police have carried out their duties, and then to withdraw charges or enter a stay of proceedings. The latter action, of course, being undertaken in open court and subject to public scrutiny. It was this course of action which was recently reaffirmed as appropriate by Mr. Ian Scott, Attorney General for Ontario, when he stayed proceedings after charges were laid by the police (with the full knowledge of the Attorney General) in the recent controversy concerning Dr. Morgentaler's abortion clinic in Toronto.[103]

While not objecting to the above approach in principle, Attorneys General in several Canadian provinces have adopted procedures whereby all charges must be submitted to the Crown by police to

96. *Police Act*, S.N.S., 1974, c. 9, as amended.

97. *Criminal Code*, R.S.C. 1985, c.46, as amended, hereinafter cited simply as "*Criminal Code*".

98. See Philip Stenning, "Appearing for the Crown", Brown Legal Publishing, Cowansville 1986, at p. 272.

99. *Criminal Code*, section 788 makes this provision applicable to summary conviction proceedings as well.

100. For a brief summary of the history, law and policy behind private prosecutions, see the Law Reform Commission of Canada, Working Paper #52, "Private Prosecutions", Ottawa, 1986.

101. See *R. v. Metropolitan Police Commission, Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.) per Denning, J. However, the *Police Act*, S.N.S., 1974, c. 9, as amended, ss. 3 and 9 purport to give the Attorney General of the Province full authority to direct criminal investigations.

102. *Attorney General of Quebec et al. v. Lechasseur et al.*, [1981] 2 S.C.R. 253.

103. "The Staying of Charges", "The Globe and Mail", Toronto, September 26, 1986, p. A6.

obtain the advice of the former as to whether the charges are "appropriate" in the circumstances.[104] While this process of "screening" is not referred to as "mandatory pre-authorization" or "permission to lay charges" it is difficult to see how in practice it will amount to much less except in the most extraordinary cases.

Proponents of the screening system argue that it holds overzealous police officers in check, reduces plea bargaining, prevents unnecessary errors due to police officers not sufficiently trained in procedure and evidence, and is more likely to result in the laying of charges in accordance with professionally enlightened understanding of the public interest.[105] Opponents of the screening approach argue that it amounts to the Attorney General's control over the laying of charges, undermines the checks and balances of the police independence concept, and underestimates the ability of well trained police officers to properly handle the laying of criminal charges. In the context of this debate it is interesting to note the actual practice of Nova Scotian Crown prosecutors, as evidenced by responses to the Crown Survey, and to compare this with the policy as understood by representatives of the Attorney General's Department.

Of the respondents in the Crown Survey only 29 percent said they rarely or never advised police in the drafting of informations.[106] If one makes the relatively safe assumption that most of these would be among the roughly 37 percent who were per diem Prosecuting Officers, then it can be inferred that advising police officers in drafting informations is a significant aspect of the full time Crown's role. However, the role may be thought to be primarily advisory rather than controlling. When asked, "How often are you required to actually draft an information for the police", over 50 percent answered "rarely" or "never", and only five percent said they did it "frequently".[107] When asked under what circumstances this would occur, the most frequent answers were:

(i) in complex cases (commercial fraud, multiple counts, or multiple accuseds),
(ii) serious cases (murders or serious sexual assaults),
(iii) charges involving new offences, or
(iv) where the investigating police officer was inexperienced, lazy or incompetent.

As a matter of policy, 62 percent of the respondents in the Crown Survey thought Prosecuting Officers should be regularly involved in the drafting of informations, 36 percent said no and two percent (one respondent) stood on the fence saying "it depends".[108]

Perhaps the most interesting responses in relation to this issue of who controls the laying of charges were obtained in answer to the

104. These provinces are Quebec, British Columbia and New Brunswick. For a description of this system with an emphasis on the experience in the latter province, see G.F. Gregory, "Police Power and the Role of the Provincial Minister of Justice" (1979), 27 Chitty's L.J. 13. For an interesting look at the Attorney General's role see also G.F. Gregory, "The Attorney General in Government" (1987), 26 U.N.B. Law Journal 59.

105. *Ibid.*

106. Crown Survey Results, Question 17(a).

107. Crown Survey Results, Question 17(b).

108. Crown Survey Results, Question 17(d).

109. Crown Survey Results, Question 12(f).

question, "In your opinion, should a police officer be given the exclusive right to decide whether or not to lay an information?"[109] Only seven percent of the respondents answered yes while 93 percent replied no. In elaborating through comments, some "no" respondents impliedly did not see the value of the two stage, checks and balances approach: "The Crown 'lays' charges not the police - the Crown has the final say" or "the prosecutor should have the right to veto groundless charges". Also, those who opposed police having an unfettered right to lay charges raised almost all of the arguments put forward by those in favour of the "screening" approach: "They don't always know what evidence is required to prove a particular charge"; "On some occasions the officer may lose his objectivity"; "Could lead to abuses or cases of over-kill"; or "If I'm going to prosecute, I should decide if charges are to be laid." There was an interesting split among the three lone Crowns who favoured police having an unfettered right to lay charges. Two gave the classic arguments in favour of checks and balances, one in the following language:

"Provides a check on power of Crown; if Crown could order that a charge not be laid, there is no accountability and the whole procedure would be secret; if police lay charge - Crown must determine its future in open court (i.e. withdrawal, stay, charge, proceed)."

This sophisticated understanding of the two stage process of checks and public accountability is to be contrasted with the following comment:

"The police officer is the investigator and best knows the case. Crown advice is just that - advice. The officer should be free to lay the charge if he feels there are reasonable grounds and the charge should proceed."

This Crown arguably does not see the merits of a two stage concept of accountability, and moreover does not understand that the public interest may be best fulfilled by the withdrawal of charges or a stay of proceedings even where there is sufficient evidence to obtain a conviction.

Lack of unanimity on these fundamental issues is apparently not restricted to prosecutors in the field. The public hearings in this Royal Commission have been presented with conflicting views from former and present senior officials from the Attorney General's Department. On the one hand, the present Director (Prosecutions) upheld the right of the police to lay charges independently subject to the exercise of Crown discretion to stay or withdraw. On the other

hand, a former Attorney General, Mr. Ronald Giffin, testified that he thought the Attorney General had the power to direct the RCMP in these matters (pursuant to their contract as provincial police), but not municipal police forces! In the interests of clarifying confusion both in the field and among the ranks of Departmental officials a recommendation from this Royal Commission is in order.

A recommendation in favour of pre-charge screening encounters principled opposition from those who argue that the independent and discretionary police functions, now under the aegis of the Solicitor General, ought not to be fettered. On the other hand, some sort of screening by a trained prosecutor would appear helpful in order to reduce problems of over-charging and multiple charging (about which more will be said below), both in relation to the evidence supporting a possible conviction and public interest factors in prosecution. The solution may be to institute a system of immediate post-charge screening. Such a system could require a weeding out of unnecessary charges prior to arraignment. Some might argue that good prosecutors do this in any event. However, the failure to formally emphasize this function, particularly in larger jurisdictions with crowded dockets, means that the prosecutor often arrives in court for arraignments in order to mechanically process whatever charges the police have laid. The arraignment process, for the Crown, then becomes a time to set trial dates rather than an opportunity to assess the necessity, in policy terms, for the charges to go forward. One suspects that the introduction of a post-charge screening process might significantly reduce the costs of the administration of justice by more rationally allocating time of both judges and counsel (although as noted earlier there is presently no adequate system of data collection by which such an hypothesis might be evaluated). It may be that a post-charge screening system could be introduced on a pilot-project basis in order to assess its efficiency.

Recommendation 10

(a) That police officers be informed in general instructions from the Solicitor General that they have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment, subject to the Crown's right to withdraw or stay the charges after they have been laid;

(b) That prosecutors be informed in general instructions from the Attorney General that police officers have the right and the duty to determine the form and content of charges to be laid in any particular case, subject to the Crown's right to withdraw or stay the charges after they have been laid;

(c) That police officers and Crown prosecutors be informed by their respective departmental superiors that police are encouraged to consult with the appropriate prosecutor concerning the drafting of informations, where such consultation might be thought useful; and

(d) That the Attorney General institute a system of post-charge screening in appropriate locations in the province (initially on a pilot project basis) to ensure that no charges which are not strictly necessary in accordance with the evidence and the public interest shall go forward.

2.2.2 Termination of Proceedings in the Public Interest

As mentioned earlier, there are two essential considerations in deciding whether to prosecute:

(i) Is there evidence which could sustain a conviction?; and
(ii) If the answer to (i) is yes, does the public interest require a prosecution?

To cite the famous words of Lord Shawcross repeated in the draft English "Criteria for Prosecution".[110]

"It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration."

This approach recognizes that the prosecution of offences is not an automatic occurrence predicated upon sufficient facts for conviction, and requires the exercise of professional judgment in relation to the circumstances of each individual case. Normally, in fact, there will be little question - if the facts warrant conviction the case will go forward. But in some instances the likelihood of a minimal penalty, the staleness of the events, the age of the offender, the nature of the offence, the complainant's attitude or some other circumstance may render it inappropriate to go forward with the charge. To make a decision that while the facts might allow for conviction, the public interest does not, is to make a value judgment which could leave the decision-maker open to charges of bias, favouritism or discrimination. The prosecutor making such a decision must be

110. See "Criteria for Prosecution and a New Prosecution System" (1983), 147 Justice of the Peace 227.

experienced, have confidence in his or her own judgment, and have the confidence of the general public concerning his or her fairness and objectivity. Just as importantly, such a prosecutor must know the policy parameters which structure his or her discretion in making such judgments, and must be confident of the backing of departmental superiors in making them.

Officials of the Nova Scotia Attorney General's Department are reluctant to admit the existence of such a discretion not to prosecute based on considerations of the public interest. The Director (Prosecutions) when asked, "What questions ought to be taken into accoun' in determining whether a charge should be laid", immediately responded "the sufficiency of the evidence". When faced with the response "But surely there must be situations where you wouldn't prosecute even where you had the evidence", he insisted "Not normally." When pushed, however, he did agree that in a small number of cases such as spousal assaults where the spouses are now reconciled or cases where the accused might be terminally ill, the Crown might agree not to prosecute. However, he stated that the basic assumption of the system was that prosecutions go ahead where there is sufficient evidence unless there is a consultation between a prosecutor in the field and the Director (Prosecutions) or Director (Criminal). However, the Director (Prosecutions) also made a distinction between the remedy sought to be invoked to terminate a prosecution already began. He indicated that a withdrawal would be primarily a local decision while a stay would be done only upon consultation.[111] (Such an approach on the nature of the mechanism is not without interest for the liberty of the subject. A withdrawal after the accused has been put in jeopardy will allow subsequent invocation of the *res judicata* rule preventing a subsequent prosecution.[112] A stay on the other hand will allow the charge to remain hanging over the accused's head, subject to revival by the Attorney General within a year.)[113]

While the Director (Prosecutions) was willing to admit the existence of a public interest factor in the decision to charge or stop proceedings, the vast majority of Crown Survey respondents were unwilling to do so. Of the 32 Crowns who volunteered answers to the question, "What factors do you take into account in determining whether a charge should or should not be laid?",[114] 27 percent pointed only to the sufficiency of the evidence. Some seemed indignant that a question with such an obvious answer should be posed: "Facts of the case, do they fit the charge, *that is it.*" or "The answer is surely obvious. Was an offence committed? Can it be proved?" Of the five who considered other factors, the following were mentioned: "the victim's wishes" (three times); "... the human factors. That is what kind of problem - straight criminal or social?";

111. Interview by author with Mr. Martin Herschorn, Director (Prosecutions), February 22, 1988.

112. For a summary of the defence of *res judicata* see: R.E. Salhany, "Canadian Criminal Procedure", Canada Law Book, Aurora, 1984, at pps. 254-63. See also *Criminal Code*, Section 610.

113. *Criminal Code*, Section 579.

114. Crown Survey Results, Question 18.

and "in rare occasions, with a very *minor* offence; whether it is in the public interest to pursue, given the cost and effort".

These responses to the Crown Survey give great cause for concern. They indicate on the part of many prosecutors a basic lack of understanding of what has traditionally been conceived of as an important aspect of the exercise of prosecutorial discretion. This may be attributable to an inadequate grounding in criminal law theory during their basic legal training. However, it is clear that the Department of Attorney General is not correcting this misconception over public interest factors in the prosecution of offences. The Blue Binders of "Advice to Prosecuting Officers" do not address these issues and the apprehensiveness of the Director (Prosecutions) on the issue would not lead one to conclude that matters are being clarified regularly in other ways. One can appreciate the apprehensiveness of the Departmental officials in not wanting to encourage prosecutors to stop prosecutions willy-nilly where there is evidence to go forward. Considerations of fairness and equality in the administration of justice call for some circumspection in the implementation of a "public interest" policy. On the other hand, to prevent injustices and the costs of needless prosecutions, a public interest policy *ought* to be developed. Such policies have been developed in England, Australia and the United States,[115] and provide a rational basis for identifying the public interest factors which should lead a prosecutor not to prosecute even where the evidence would allow it. The new English criteria are reproduced as Appendix 11. It is to be noted that the American and Australian guidelines also identify discriminatory factors which should not be the basis for a decision not to prosecute in the face of the evidence. The American federal guidelines are found in Appendix 12, and the Australian Commonwealtn Guidelines in Appendix 13.

The invocation of public interest factors for non-prosecution fit well, of course, with the notion of police independence and the two step process discussed earlier. In a situation where the police and/or citizens have the right to lay charges, but where the Crown will feel free to withdraw or stay, the invocation of public interest factors will occur in an open and accountable fashion. There is greater need for concern about bias in the operation of such practices where the Attorney General feels free to direct police not to lay charges in confidential or private instructions which are not open to public scrutiny. The following recommendation is proposed for adoption by this Royal Commission in the light of the foregoing discussion.

115. For recent commentary on the issues at stake here see: Andrew Ashworth, "The 'Public Interest' Element in Prosecutions", [1987] Crim. L. Rev. 595; Andrew Sanders, "Prosecution Decisions and the Attorney General's Guidelines", [1985] Crim. L. Rev. 4; and Julie Vennard, "Decisions to Prosecute: Screening Policies and Practices in the United States", [1985] Crim. L. Rev. 20. See also, The English Code for Crown Prosecutors, Crown Prosecution Service, HMSO, Southampton, 1986; Australia's Prosecution Policy of the Commonwealth, Australian Government Publishing Service, Canberra, 1986; and the Prosecution Policy and Guidelines of the Director of Public Prosecutions: New South Wales, Sydney, 1987.

Recommendation 11

(a) That the Attorney General promulgate a clearly stated policy concerning the public interest factors which should, and should not, be considered in deciding whether to undertake or stop a prosecution even in the face of evidence which could sustain a conviction;

(b) That the factors which might arise for consideration in determining whether the public interest requires a prosecution, include:

(i) the triviality of the alleged offence or that it is of a "technical" nature only;

(ii) the youth, age, physical health, mental health or special infirmity of an alleged offender or witness;

(iii) the staleness of the alleged offence;

(iv) the degree of culpability of the alleged offender (particularly in relation to other alleged parties to the offence);

(v) the likely effect of a prosecution on public order and morale;

(vi) the obsolescence or obscurity of the law;

(vii) whether the prosecution would be perceived as counter - productive (such as by making a "martyr" of an alleged offender or by providing publicity to an alleged hate propagandist);

(viii) the availability or efficacy of any alternatives to prosecution in the light of the purposes of the criminal sanction;

(ix) the prevalence of the alleged offence and any related need for deterrence;

(x) whether the consequences of any resulting conviction would be unduly harsh or oppressive;

(xi) any entitlement of the State or other person to compensation, reparation or forfeiture if prosecution action is successful;

(xii) the attitude of the victim of the alleged offence to a prosecution;

(xiii) the likely length and expense of a trial;

(xiv) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;

(xv) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;

(xvii) the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice.

(c) That the factors which are to be excluded from consideration in determining whether the public interest requires a prosecution, include:

(i) the alleged offender's race, religion, sex, national origin, political associations, or beliefs - except in so far as these may relate to any program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups and which may be relevant to the public interest in the prosecution or its outcome;

(ii) the prosecutor's personal feelings concerning the victim or the alleged offender;

(iii) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or

(iv) the possible effect on the personal or professional circumstances of those responsible for the prosecution decision.

(d) That, where a prosecutor decides not to undertake or to stop a prosecution by reason of a public interest factor such as those mentioned in (b), a notation of this decision be placed in the file relating to the case in question.

(e) That the Solicitor General bring the foregoing public interest factors relevant to the prosecution of offences to the attention of police forces operating within the province.

2.3 Disclosure of the Crown's Case

While the terms discovery and disclosure are sometimes used interchangeably,[116] there is an important distinction between the two concepts. Disclosure connotes a positive duty on the Crown to provide information to the defence regarding the evidence in the Crown's possession relating to the accused's guilt or innocence. Discovery seems to connote less of a burden on the Crown and more of a right or even a mere opportunity for the defence to gain access to the Crown's case.[117] It is often said, for example, that the preliminary inquiry is an opportunity for the defence to discover the Crown's case through hearing and cross-examining the Crown's witnesses. However, the jurisprudence is clear that the Crown need only present enough evidence at a preliminary inquiry to obtain a committal of the accused for trial, and is under no obligation to present all or even the key witness whom it intends to call at trial.[118]

This minimalist approach to the preliminary inquiry prevails in Nova Scotia. Among the respondents in the Crown Survey 55 percent said they always, or frequently call only enough evidence to get a committal for trial, and respondents in the Defence Survey

116. See Law Reform Commission of Canada, Working Paper #4, "Discovery", Minister of Supply and Services, Ottawa, 1974.

117. Howard Shapray, "The Prosecutor as Minister of Justice: A Critical Appraisal, (1969) 15 McGill L.J. 124 at p. 135.

118. *Patterson v. The Queen*, [1970] S.C.R. 409.

confirmed this.[119] When asked whether they called all witnesses known to the Crown likely to be called at trial, 53 percent of the Crowns said they rarely or never did this, although 30 percent said they frequently did.[120] The Defence Survey results also confirm this, although the defence perception is that they get a little more complete evidence than Crowns think they give.[121] The upshot of this information however, is that while the preliminary inquiry may be an opportunity for limited discovery, it is certainly not a mechanism for complete disclosure.

There are in Canadian criminal law, however, statutory provisions which give the accused a limited right to disclosure of certain items of proof. *Criminal Code* Section 603 entitles an accused who has been committed for trial to obtain copies of the indictment, evidence at a preliminary and his own statement. However, this does not give a right to pre-trial discovery of these items and does not provide a right of access to out of court statements from other persons.[122] Code sections also give rights to particulars on indictments[123] or informations[124] but courts have been reluctant for all these to be used as discovery mechanisms.[125] The wire-tap provisions of the Code provide an accused who has been "bugged" with a right to notice of the fact and a transcript.[126] Similarly exhibits can be released for examination by an accused.[127] Finally, Section 10 of the *Canada Evidence Act* has been interpreted to allow defence access to any prior inconsistent written statements to be used by the Crown to impeach witnesses.[128]

These statutory provisions were introduced, at least in some measure, to counter the resistance to the development of common law rights to disclosure on the part of English judges.[129] But the modern Canadian approach to disclosure is being revealed in recent interpretations of Section 7 of the *Canadian Charter of Rights and Freedoms*. The Ontario Court of Appeal has held that preferment of a direct indictment in the absence of adequate disclosure may impair the accused's right to make full answer and defence, thus contravening the Charter's Section 7.[130]

2.3.1 Disclosure by Crown Prosecutors in Nova Scotia

In the face of what appears to be an emerging constitutional right of an accused to disclosure of the Crown's case, it may be helpful to examine the various Attorney General guidelines on disclosure from other Canadian provinces, in addition to Nova Scotia's "Advice to Prosecuting Officers".

The disclosure guidelines of most provinces set out a "guiding principle" of "full disclosure" or "full and fair disclosure" and then provide a list of pieces of evidence which are exceptions to the

119. See Crown Survey Results, Question 25(a)(i) and Defence Survey Results, Question 11(a).

120. Crown Survey Results, Question 25(a)(ii).

121. Compare Defence Survey Results, Question 11(a)(ii) to Crown Survey Results, Question 25(a)(ii).

122. There is a considerable case law interpreting this provision which will not be explored here.

123. *Criminal Code*, Section 587.

124. *Criminal Code*, Section 795.

125. See *R. v. Chew*, [1968] 2 C.C.C. 127 (Ont. C.A.).

126. *Criminal Code*, Section 189(5).

127. *Criminal Code*, Section 605.

128. *R. v. Tousignant et al.* (1962), 133 C.C.C. 270; and *R. v. Dorion* (1985), 67 N.S.R. (2d) 130 (N.S.S.C. App. Div.).

129. See *Rex v. Holland* (1790-1792), 4 Durn & E. 691 (K.B.) at p. 692, per Lord Kenyon, C.J.

130. *Re Regina and Arviv* (1985) 19 C.C.C. (3d) 395 (Ont. C.A.) per Martin, J.A. (leave to appeal to S.C.C. refused); for a similar ruling, see *R. v. Rosamond* (1983), 5 C.C.C. (3d) 523 (Sask. Q.B.), and *R. v. Furmara* (1983), 12 C.R.R. 271. But cf. *R. v. Morin* (1985), 23 C.C.C. (2d) 550 (Ont. H.C.J.).

Table 4
Summary of Provincial Guidelines on Disclosure

	NS (7.2)	NFLD (1)	NB (240)	ONT	MAN (36)	SASK (2.A.1)	ALTA (35)	BC (8)
(A) Guiding Principal: 1. Full disclosure	•					•		
2. Full and fair disclosure		•						•
3. Full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution	•		•		•			
(B) Items to be Provided to Defence: 1. The Crown sheet (in most cases)	•							
2. Criminal record of the accused		•	•	•	•	•	•	
3. Where possible - exhibits (for examination)		•	•	•	•	•	•	•
4. Police report to Crown counsel (with witness names edited where danger may result) at Crown's discretion	•		•		•	•		
5. Any statement by the accused to a person in authority	•		•	•	•		•	•
6. Any professionally prepared reports (expert's reports)			•	•	•		•	•
7. A copy of the "information"			•				•	•
8. Witness' statements subject to the discretion of Crown counsel not to release where danger may result	•	•				•		•
9. Victim impact information; intended to be submitted by Crown on sentence								•
10. Either inspection of statements of Crown witnesses or a summary of the statements (not statement itself)	•	•			•			
11. Criminal record of any witness (where the prosecutor feels it is relevant)			•	•	•		•	
12. A written outline or an oral summary of the evidence of the witnesses the Crown intends to call			•					
13. Where appropriate the names and addresses of Crown witnesses		•	•	•	•	•	•	
14. Any evidence which may assist the defence which the Crown does not intend to adduce				•				
15. A continuing obligation to disclose information found in ongoing investigation	•	•	•				•	
(C) Info Not to be Provided: 1. Statement , address of young sexual assault victim: Crown's discretion	•							
2. Refusal of information where disclosure is not in the best interest of justice	•							
3. Confidential or extraneous material or police reports containing personal opinions	•							
4. Police reports, memoranda and informants' names						•		
5. Court briefs which contain "confidential information"			•					
6. Police reports which contain informants' names or confidential info (without approval of police)							•	

disclosure rule. Some of the statements provide an abbreviated statement of principle underlying these exceptions. A summary of the contents of provincial guidelines on disclosure is found in Table 4.

The Nova Scotia statement on disclosure from the "Advice to Prosecuting Officers" which was in effect at the time of the Crown and Defence Surveys is found in Appendix 14. A new policy on disclosure was issued subsequent to the circulation of the first draft of this study but prior to final revision and is found as Appendix 15. The opening paragraph of the original policy statement was one of the widest and most generous statements of disclosure to be found among its provincial counterparts. However, the initial principle of

openness was effectively gutted by exception three which would justify limiting or withholding disclosure where "it is felt that disclosure would be contrary to the interests of justice". Such an open-ended exemption provided virtually no guidance for Crown prosecutors, and potentially risked nullification of any principle of full disclosure. The Crown and Defence Surveys provide some information concerning how the original disclosure statement worked in practice. The data also provides important background for assessing the potential effectiveness of the new policy statement in Appendix 15.

Table 5
Correlation Between Status of Prosecutor and Disclosure of Information to Defence Counsel

	Automatically	Only on Request	Depends
Prosecuting Officer	2 (28.6%)	3 (42.9%)	2 (28.0%)
Assistant Prosecuting Officer	8 (42.1%)	11 (57.9%)	0 (0%)
Per Diem Prosecuting Officer	5 (31.2%)	9 (56.3%)	2 (12.5%)

When asked whether they made disclosure to defence counsel "automatically", 36 percent of the respondent Crowns replied they did, while 54 percent said they did it only upon request. The remainder said "it depends".[131] However, only 18 percent of the respondents in the Defence Survey indicated that automatic disclosure was made "always" or "frequently"[132]. Table 5 shows a trend to the effect that Assistant Prosecuting Officers may be more likely to disclose automatically than Prosecuting Officers.

There was no significant difference between the automatic disclosure propensities of those Crowns in jurisdictions under 40,000 inhabitants as opposed to those of over 40,000. These figures are somewhat difficult to interpret since no definition of "automatically" was given to respondents. However, they may indicate that at the time of the Survey Nova Scotian Crowns were taking a "discovery" rather than a "disclosure" attitude toward providing information to defence counsel.

It is important to try to get a sense of what it is that Crown counsel "disclose" pursuant to the "advice" from the Attorney General on the topic. Crowns were asked in the Survey how often they give unrestricted access to the complete file in the case to defence counsel, and 72 percent answered that they did so always or frequently. That 28 percent would reply "always" is perhaps surprising, given the duty in the final paragraph of the old disclosure "guideline" to purge the file of confidential information and police reports.[133] However, these levels of disclosure are not entirely confirmed by the Defence Survey Results. Only 55 percent of defence respondents said they always or frequently got access to the whole file, while a higher proportion of defence respondents than Crowns said this happened only sometimes or rarely.[134]

131. Crown Survey Results, Question 22.

132. Defence Survey Results, Question 7(a).

133. Crown Survey Results, Question 23(a).

134. Defence Survey Results, Question 8.

When asked about disclosure in relation to particular items of evidence, even greater disparities were apparent between the self-reported practices of the Crowns and the Crown practice as perceived by defence counsel. There was a high degree of unanimity on the point that Crown sheets were almost always or at least frequently given to defence counsel,[135] but unanimity ended there. While 91 percent of the Crowns reported that they always disclosed all statements made by the accused, only 65 percent of defence counsel reported they always received them.[136] It may be thought surprising that the figure is not 100 percent since by virtue of *Criminal Code* Section 531 the defence will have a statutory right to these at trial. Fifty-eight percent of Crowns said they always made available all statements made by witnesses, while only 24 percent of defence counsel said these were always made available to them.[137] The greatest discrepancy concerns the disclosure of names of persons who may have evidence whom the Crown intends not to call. Seventy-four percent of the Crowns said they either always or frequently make these available to defence counsel, while only 18 percent of defence counsel said they always or frequently receive them.[138] Finally, on the matter of police reports, 67 percent of Crowns said they always or frequently make these available to defence counsel, while only 35 percent of defence counsel say they receive them always or frequently.[139] It can be argued on the basis of the above information that self-reported Crown disclosure fell short of the full disclosure principle found in the Attorney General's instruction. If the information provided by respondents to the Defence Survey is given credence, then one must conclude that Crown practice fell dismally short of the full disclosure ideal.[140] The new disclosure guidelines ought to rectify this attitude.

Serious concerns about the extent of disclosure also flow from information in the Crown and Defence Surveys on the conditions which Crown prosecutors were imposing upon the use of information made available to the defence. Both questionnaires asked how often conditions were imposed on the use of disclosed information, and Crowns and defence counsel have different perceptions. Ten percent of Crowns said that they always or frequently imposed conditions, while 69 percent claimed to do this rarely or never.[141] Defence Survey responses show an interesting bimodal frequency distribution. Slightly more than 40 percent of defence counsel said conditions were always or frequently imposed, while slightly less than 40 percent said they were rarely or never imposed. One might wish to explore further whether this set of responses from defence counsel flowed from the individual characteristics of the defence counsel respondents (*ie.*, do most Crowns think *this* defence lawyer can or cannot be trusted). But for whatever reasons, it appears that

135. Crown Survey Results, Question 23(b)(i); Defence Survey Results, Question 9(i).

136. Crown Survey Results, Question 23(b)(ii); Defence Survey Results, Question 9(ii).

137. Crown Survey Results, Question 23(b)(iii); Defence Survey Results, Question 9(iii).

138. Crown Survey Results, Question 23(b)(iv); Defence Survey Results, Question 9(iv).

139. Crown Survey Results, Question 23(b)(v); Defence Survey Results, Question 9(v).

140. At a recent sitting of this Royal Commission (May 17, 1988) the Honourable Judge Felix Cacchione gave testimony on the practice of Crown disclosure to defence counsel which is consistent with the Defence Survey Results. He stated that "full disclosure doesn't really exist as Mr. Giffin (former Attorney General of Nova Scotia) is saying it should exist or does exist". Judge Cacchione based these comments on his experience as a defence counsel and stated that "disclosure depended on how well defence counsel got along with the Crown as opposed to a positive obligation on the Crown to disclosure".

141. Crown Survey Results, Question 24(a).

there was considerable variation in the imposition by Crowns of "conditions" upon the use of information by defence counsel. It must be stated at the outset of this discussion that the new disclosure guidelines, on their face, would greatly restrict the imposition of conditions in relation to disclosure. This matter will be taken up again in the assessment of the new guidelines under the heading "Reform of Nova Scotia's Disclosure Policy".

Crown and defence respondents were asked the extent to which conditions might flow from a desire to protect witnesses or protect victims, to prevent loss of physical evidence, because of bad prior experience with defence counsel, or because the investigating officer had expressed personal opinions in the documents on file. All of these reasons were said to be relevant in varying degrees by both sets of respondents. The first three of these motivating reasons, of course, were legitimate in the sense that they were mentioned in the Attorney General's advice to prosecutors. The two which are not so mentioned are worthy of particular comment. First, only 29 percent of prosecutors said they never imposed conditions upon disclosure because of bad prior experience with a particular defence counsel.[142] Thus 71 percent are admitting they condition disclosure for reasons which may not necessarily relate to the interests of justice for the accused presently under consideration. This gives reason for concern. Second, 77 percent of the Crowns who responded to the question about imposing conditions concerning opinions expressed by investigating officers indicated that they did so sometimes or at least on rare occasions for this reason.[143] This may have been a sensible way to handle the issue, but in formal terms it was contrary to the Attorney General's instructions on the matter. At the very least, the Crown Survey results indicate that the disclosure instructions were being limited for improper motives in certain circumstances.

142. Crown Survey Results, Question 24(b)(iv).

143. Crown Survey Results, Question 24(b)(v).

The Defence Survey provides more disquieting information on the Crown's motivations for imposing conditions. Eighteen defence counsel volunteered reasons other than those listed as to why Crowns impose conditions upon disclosure. Four said it was because Crowns feared "losing" if they made disclosure, three said it was because of "Departmental policy", and three said the Crown prosecutors often have not obtained the information from the police. These statements merit consideration. If indeed some Crowns do not disclose because of a fear of losing, their attitude toward their role is an unethical one, and contrary to the description from the Supreme Court of Canada in the *Boucher* case which is cited in the position description of the Prosecutor IV found in Appendix 9. Some defence counsel must have believed that non-disclosure or conditional disclosure was Departmental policy. To the extent that they may have received this impression from Crown practice, they may have been unable to

challenge it since the "contrary" "Advice to Prosecuting Officers" was confidential. The suggestion that the Crown prosecutors may not have obtained information from the police will be dealt with more fully below.

The Defence Survey asked respondents to indicate what kinds of conditions were imposed by prosecutors when disclosing information about their case.[144] Three main categories of conditions were given, each of which will be discussed in turn. The first seems a petty problem, but was clearly a major practical concern. Unlike federal prosecutors, provincial Crowns would not generally allow defence counsel to photocopy material from the Crown file. Thus defence counsel were forced to sit in the prosecutor's office with a dictaphone transcribing the contents of the file or writing it out in longhand. The Executive Director (Administration and Finance) tried to justify this on the grounds of cost, and the fact that every Crown Prosecuting office is not equipped with a photocopying machine.[145] This is surely untenable. Photocopiers are widely available, and if the Attorney General's Department cannot bear the cost then surely copies can be made at the accused's expense (or that of Legal Aid as the case may be). It is very difficult not to see this situation as simply a relic of a bygone age, or an attitude of contempt toward defence counsel which will condone minor forms of harassment on a wide scale.

The second category of conditions imposed by Crown prosecutors when disclosing information to the defence related to the use of disclosed material in cross-examination. Crown sheets, police and other reports, and witness statements are, or at least were sometimes given to defence counsel with the blanket proviso that they not be used in the cross-examination[146] of witnesses. The implied sanction, of course, is that failure to abide by the condition will disentitle defence counsel to such disclosure in the future. The propriety of the sanction aside, it is necessary to examine each piece of disclosed information to see how it ought to be used by defence counsel. Witness statements, as in the prosecution of Donald Marshall, Jr., may provide relevant information on a point in issue or be used to challenge the credibility of the witness. The defence has a full right to a cross-examination of all witnesses, and one of the accepted ways of challenging a witness' credibility is to confront that witness with prior inconsistent statements, even if these might be excluded as hearsay if offered as evidence in and of themselves. Attempts by Crown prosecutors to limit use of witness statements for this purpose are clearly improper and contrary to the disclosure principle. However, the practice was widespread in Nova Scotia at the time that the Crown and Defence Surveys were conducted.

This having been said, it is also clear that police "will say" statements (that is, opinions of police officers as to what evidence a

144. Defence Survey Results, Question 10(b)

145. Interview by author with Mr. R.A. MacDonald, Executive Director (Administration and Finance), February, 1988.

146. See the author's opinion on the errors in evidentiary rulings at the trial of Donald Marshall, Jr. submitted to this Royal Commission in 1987.

witness may give) are *not* witness statements and they are not to be used when cross-examining witnesses as if they are. It may be that if the investigating police officer is on the witness stand, and if defence counsel sees a "will say" statement in the Crown sheet, that officer might be asked if a witness said "x" to the officer. If the reply is "yes", then that statement given by the officer under oath in court may properly be used as a prior inconsistent statement to challenge the subsequent witness who said it. However, "will say" statements found in the Crown sheet or in other police reports on file cannot be used as "prior inconsistent statements" against the witness quoted in the police report. They are not the same as signed witness statements or evidence on oath of prior statements. This is all a matter of standard evidentiary law. But these distinctions are not made by some Nova Scotian Crown prosecutors, if the responses to the Defence Survey are to be given credence. It appears that some Crowns simply "prohibit" any cross-examination based on the Crown sheet, rather than limiting their objections to improper use of police opinions to challenge witnesses at large. To this extent Crowns who purport to generally prohibit the use of the Crown sheet in cross-examination for legitimate purposes are improperly limiting disclosure.

The third category of frequent limitations which Crowns imposed upon defence counsel, according to the Defence Survey results, was the agreement not to divulge information or show copies of statements to the accused. The Crown's theory here seems to have been that defence counsel may wish to use the information at trial or in preparation in order to provide a full answer and defence for the accused; however, the accused may be psychologically unable to handle the information, may use the information to intimidate witnesses or may otherwise interfere with the administration of justice, so it should not be given to him or her. At least one defence respondent stated that he or she refuses to accept information which the Crown wishes to hold from an accused. This is noble, on the one hand, yet potentially prejudicial to the interests of the accused client on the other. Crowns using this tactic put defence counsel in very awkward circumstances. The "advice" to Nova Scotia prosecutors operative at the time of the surveys encouraged this behaviour on the part of Crowns by saying "... the Crown shall make full disclosure of its case to the accused, or counsel ..." without making it clear that it is the accused who has the *right* to disclosure not the lawyer. This problem ought not to be resolved by means of ambiguously drafted guidelines which can be the subject of varying interpretations and even easier abuse by Crown prosecutors minded to do so.

2.3.2 Police Disclosure to Crowns: A Prerequisite to a Rational Policy

It was mentioned earlier that several respondents to the Defence Survey suggested that disclosure was sometimes not made because the Crown prosecutor had not received statements and other information from police prior to trial. One defence respondent suggested that this was usually due to the fact that Crowns were so overburdened that prior trial preparation is rare, and that the police and the Crown simply "don't get it together" early enough to give timely disclosure. It is easy to believe that this may often be the case. However, at least one defence counsel gave more sinister explanations for some occurrences. He or she suggested that some police officers withhold statements from Crowns in the interests of getting a conviction because they fear that the Crown will disclose the information and jeopardize the case, or that there is evidence of some police impropriety. This is clearly related to one of the most serious allegations being made by some against the Sydney police in the prosecution of Donald Marshall, Jr.

The Crown Survey attempted to obtain information on this issue. Crowns were asked: "In preparation for trial, how often are you given access to the entire police file?" Eighty percent of the respondents thought that they got complete access either always (55 percent) or at least frequently (25 percent).[147] When asked their opinion on the circumstances under which the police might withhold information, a majority said "it never happens". However, a significant minority suggested that some police withhold information to get around disclosure or to cover improprieties, and several others suggested it might be done to protect the name of an informer. When asked whether there were procedures in place which might help ensure that a Crown got access to all relevant police information, 23 percent said "yes", 74 percent said "no" and the rest said "it depends".[148]

147. Crown Survey Results, Question 19(a).

148. Crown Survey Results, Question 19(c).

This is clearly a serious issue. If police are not candid in their dealings with Crown prosecutors, the whole policy on disclosure may go for naught. It is trite to say that a dishonest cop who wishes to subvert the system may do so, and rules are not likely to completely contain such abuse. However, the honest, hardworking police officer who must be assumed to be the backbone of the system must be convinced of the merits of disclosure. The Solicitor General's Department ought to ensure that the new Attorney General's disclosure policy is circulated to police officers and that information on the necessity for the disclosure policy is a part of police continuing education programs. More importantly, it may be that standardized filing procedures might be adopted which would encourage information storage in systems and formats which would

be readily understandable and available to Crown prosecutors. Police disclosure to the Crown is, indeed, a necessary prerequisite to a rational disclosure policy.

2.3.3 The Reform of Nova Scotia's Disclosure Policy

Reform of Canadian law and policy on disclosure is not a new topic. The Law Reform Commission of Canada published its first working paper on the matter in 1974,[149] and initiated a number of experimental projects on disclosure thereafter. The Commission's work culminated in a report to Parliament which proposed amendments to the *Criminal Code* in order to place the accused's right to disclosure on a statutory footing.[150] During this period the Law Reform Commission was consulting with the judiciary, Attorneys General, the defence bar, police and legal academics on the appropriate form which disclosure should take in the criminal process. In addition, the topic was the subject of research by the Federal Government,[151] was examined by a special committee of the Law Society of Upper Canada,[152] received comment in the Zuber Commission of Inquiry into Courts in Ontario,[153] was addressed briefly by the recent report of the federal government's Sentencing Commission,[154] and has been under consideration by the Uniform Law Conference of Canada.[155] All these bodies agree that improved laws or policies on disclosure are required in Canada. The evils revealed in the Crown and Defence Surveys undertaken for this study are thus another chapter in a well-known saga and, although reprehensible, are unfortunately not startling.

The important purposes of full disclosure are summarized by the Uniform Law Conference in the following terms:

(a) to ensure, unless there is a compelling reason to the contrary, that the accused person has access to all evidence relevant to the case;

(b) to ensure the accused person is aware of the case which must be met, is not taken by surprise and is able to adequately prepare his or her defence;

(c) to resolve non-contentious and time-consuming issues in advance of the trial in an effort to ensure more efficient use of court time; and

(d) in some cases, to encourage the entering of guilty pleas at an early stage of the proceedings.[156]

149. Law Reform Commission of Canada, Working Paper #4 "Discovery", Ministry of Supply and Services, Ottawa, 1974.

150. Law Reform Commission of Canada, Report #22, "Disclosure by the Prosecution", Ministry of Supply and Services, Ottawa, 1984.

151. Brookbank,C. "Disclosure Practices in Toronto", Report to the Federal Department of Justice, January, 1981.

152. Law Society of Upper Canada, "Report of the Special Committee on Preliminary Hearings", 1982; Chairman, Mr. G.A. Martin.

153. Zuber, T.G., "The Report of the Ontario Courts Inquiry", Queen's Printer: Ontario, 1987.

154. Report of the Canadian Sentencing Commission, "Sentencing Reform: A Canadian Approach", Ministry of Supply and Services, Ottawa, 1987.

155. Uniform Law Conference of Canada, Proceedings of the 66th Annual General Meeting, Calgary, Alberta, 1984.

156. Uniform Law Conference of Canada, Proceedings of the 67th Annual General Meeting, Halifax, N.S., August 1985 at p. 48.

To these considerations might be added the imbalance in investigative resources between the state and the individual in the vast majority of criminal cases - indigent accused persons cannot afford private investigators.

Two main approaches to disclosure are presently being considered in Canada. The first is contained in the Uniform Disclosure Guidelines proposed by the Uniform Law Conference in 1985 which form Appendix 16 to this Study. The guidelines are just that - guidelines to prosecutors which would not have the force of law. These guidelines are an improvement over the old ones found in the "Advice to Prosecuting Officers" in Nova Scotia in that they set out a purpose for disclosure, and make clear that items (a) to (f) in paragraph four are to be given to an accused *prior* to the trial or preliminary. However, the guidelines would not impose a clear duty upon prosecutors to disclose witness statements, which are subsumed under the general heading of providing information on "the circumstances of the offence". Nor would the guidelines impose a clear duty to disclose names and addresses of potential witnesses which remain in a residual category of optional disclosure "at the discretion of the Crown Attorney". Finally, the "continuing obligation ... to disclose any new *relevant* evidence" (emphasis added) raises an issue which goes unaddressed throughout the guidelines as a whole - the *relevance* issue. The Crown should be under a duty to disclose any information obtained in relation to the case against the accused. The nature of an accused's defence may not be apparent, and need not be disclosed, to the Crown prosecutor by the defence. Therefore, any hint in the guidelines that the prosecutor can make determinations as to what to disclose based on his or her own assessment of "relevance" is to be avoided. The duty to disclose information should be cast in the broadest terms.

The second main approach to disclosure which is under active consideration in Canada at the present time is the Law Reform Commission of Canada's proposal to introduce a statutory duty in the Crown to disclose by way of amendments to the *Criminal Code*. The Commission's proposed amendments are found in Appendix 17 to this study. The statutory duty as described has the obvious advantage of providing an enforcement mechanism in the event of breach - the judge will either not proceed with the case or make some other appropriate order for disposition of the matter in the event of improper failure to disclose. Of course, the prosecutor would not be required to disclose under this scheme where a court is satisfied that "disclosure will probably endanger life or safety, or interfere with the administration of justice". This latter standard is expressed in firmer terms which are preferable to those used in the Uniform Law

Conference Guidelines, and has the benefit of casting the burden on the Crown to demonstrate the need for its invocation.

On July 18, 1988, after the circulation of the first draft of this study, the Attorney General promulgated a new policy on disclosure, entitled "Disclosure Guidelines", which is found in Appendix 15. These new guidelines, based as they are upon the Uniform Law Conference model, are a dramatic amelioration of the former situation. For this development, the Attorney General and his Department deserve this Commission's commendation. The new guidelines, in fact, improve upon the Uniform Law Conference model in one significant and necessary respect - they provide that an accused is entitled to obtain copies of all written statements made by witnesses. These guidelines, at least in principle, ought to redress most of the difficulties identified in this study in relation to Crown practice under the old guidelines. The purposes of disclosure are made clear. The accused is *entitled* to full disclosure as a general principle, and entitled to a specific list of important items *prior* to the preliminary inquiry or trial. The imposition of "condition" by prosecutors in relation to these items would not appear to be within the spirit or letter of the new guidelines. The principle of a continuing obligation to disclose new information is, at least partially, recognized.

Given this salutory policy change, critical comment might appear captious. However, the new guidelines do suffer from some of the deficiencies identified above in the Uniform Conference model. There is a distinction made between information to which an accused is entitled, and that which is to be given "at the discretion of the prosecutor balancing the principle of full and fair disclosure with the need to prevent endangering the life or safety of witnesses or interference with the administration of justice". It is difficult to take any exception to this principle, although the example used in the next sentence of the guidelines is unnecessarily restrictive. It states: "Such additional disclosure *may* include names and addresses of any potential witnesses keeping in mind possible need for protection from harassment." The balance between the right of the accused to due process and the necessity of protecting witnesses is admittedly a difficult matter to establish. However, the Crown is not in a position to judge just how important a potential witness might be to an accused's case, and the example might better have been expressed in the following terms: "Additional disclosure shall normally include names and addresses of any potential witnesses, unless there are grounds to believe that there is a need to protect them from intimidation or harassment". Related to this issue is the reference in the final paragraph of the new guidelines to "new relevant evidence". This has a narrow technical meaning which might be the basis for a

156(a). There is, of course, a legal and ethical duty to disclose evidence which may assist the accused, even if not part of the Crown's case. See *Re Cunliffe and the Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560 (B.C.C.A.).

prosecutor's decision not to inform the accused or counsel of information relating to the case which would have a bearing on issues unbeknownst to the Crown. The wording can easily be altered to take this problem into account.[156(a)]

Additional problems in relation to the new policy relates to their public availability and their enforceability. The issues are intertwined. Unless the guidelines are published and known to both lawyers or individuals who may find themselves accused of offences, any breach of the guidelines may go unnoticed for want of a knowledgeable complainant on the issue. The Director (Prosecutions) states that the new guidelines are not regarded as confidential, and are available to defence counsel (and presumably accused persons) on request. However, they were not published with the Attorney General's press release on the topic. More importantly, since they do not have the force of statute or regulations, they cannot be used in court to require Crown disclosure in the event of a dispute over the meaning of their terms. In this respect, the statutory changes proposed by the Law Reform Commission of Canada which would place a right to disclosure in the *Criminal Code* are to be preferred over unenforceable guidelines, even while recognizing that such statutory provisions must be drafted in such a manner as to give the Crown considerable flexibility.

The following recommendations are proposed with a view to redressing the problems identified above.

Recommendation 12

(a) That the Royal Commission endorse the new "Disclosure Guidelines" announced by the Attorney General on July 18, 1988 with the following exceptions:

(i) the disclosure guidelines should state that they are to be made available to counsel or accused persons upon request, (and be made available to the general public in accordance with recommendation 1);

(ii) the disclosure guidelines, when referring to appropriate matters for discretionary disclosure, should include the statement: "Additional disclosure shall normally include names and addresses of any potential witnesses, unless there are grounds to believe that there is a need to protect such witnesses from intimidation or harassment"; and

(iii) the obligation of continuing disclosure should be drafted to require provision of "new information relating to the case which the prosecutors believe may be relevant evidence or of assistance to the defence".

(b) That the Attorney General support the enactment of statutory duties of disclosure as proposed by the Law Reform Commission of Canada in its Report to Parliament, # 22 both in the Criminal Code, *and in relation to provincial statutory offences.*

Recommendation 13

(a) That the Solicitor General inform police forces operating within the province of the Attorney General's guidelines on disclosure and require compliance with their principles in relations between police and prosecutors;

(b) That the Solicitor General ensure that continuing police training include information on the necessity of the disclosure policy to the sound administration of criminal justice within the province; and

(c) That the Solicitor General take steps to ensure that police departments operating within the province establish appropriate information storage and retrieval systems in relation to cases under investigation so as to ensure, among other things, the effectiveness of the Crown disclosure policy.

2.4 Plea Negotiation

2.4.1 Terminology, Policy and Purpose

Plea bargaining, plea negotiation, plea agreement or agreed settlement of criminal charges are phrases, in descending order of pejorative connotation, which are used to label the process of discussion and agreement by which an accused pleads guilty in return for the promise or receipt of a perceived benefit. These phrases are used to describe situations which include agreements to plead guilty to charges other than those originally laid, to only some charges where others have been stayed or withdrawn, or to the original charge with an understanding that Crown counsel will make certain representations on sentence. The term "plea negotiation" will normally be used in this study since it may be thought a neutral description, and since it is also the label employed in Nova Scotia's "Advice to Prosecuting Officers". The Law Reform Commission of Canada's term "plea agreement", however, is ultimately proposed as preferable in final recommendations.

Plea negotiation is a controversial subject among observers both inside and outside the criminal justice system. "Plea bargaining" is condemned as a process which subverts the ends of justice by thrusting accused persons into a secret, aleatory limbo where the outcome of their case will depend not on the facts and the law, but rather on the negotiating skill of their lawyer, the degree to which the

police have over-charged, or the extent to which the Crown doubts the validity of the case or fears crowded dockets. "Voluntary settlement of criminal cases", on the other hand, is praised as a means by which to efficiently resolve criminal charges without the expense and delay of a fully controlled criminal trial, and without a traumatic impact on accused persons and victims alike.[157] What is clear is that the present system of criminal justice in Canada depends for continued smooth operation on a continued high proportion of guilty pleas, and that many accused people are willing to plead guilty after their defence counsel and the Crown prosecutor have together projected some "writing on the wall" for the accused to see.[158]

Although the process of plea bargaining has received negative comment from Canadian courts of appeal,[159] and judicial involvement in the process of plea negotiation is generally rejected in Canada,[160] courts of appeal have been forced to take account of the existence of the phenomenon. This has occurred most prominently in those cases where accused persons have objected when the Crown has appealed a decision, in effect repudiating an agreement, based on a plea bargain. Some courts have held that the Crown should only be relieved of its bargained result "for the gravest possible reasons",[161] while others have said that the bargain is only a "factor to be taken into account" in considering the appropriateness of the outcome.[162] In either case, however, the courts of appeal have been forced to take cognizance of plea negotiation.

The position taken in this study is that plea negotiation is a legitimate means by which to resolve criminal cases if its purpose is properly understood, and if safeguards are established to prevent it from being used for improper purposes. The only legitimate purpose which can be recognized for plea negotiation is to attain an outcome in the prosecution which might fairly represent the likely result without the bargain, but which can be achieved in a more timely and less costly manner. In saying this it must be remembered that carrying charges forward requires the Crown to evaluate both the sufficiency of the evidence and the public interest in pressing on with the matter. If discussions between Crown and defence reveal that the evidence will support conviction only on a lesser and included offence, or that a minimum sentence is adequate, or even that no prosecution should be undertaken, an agreed upon solution to this effect will be in the interests of justice. The chief danger in plea negotiation is that the Crown, either through actions of the police or prosecutors, may overcharge, use multiple charging or other such tactics to obtain guilty pleas where the evidence or the public interest do not warrant that result. This will not only cause injustice to the particular accused but may result in inequality of outcomes which puts the whole system of sentencing out of proportion.[163] The most

157. For an excellent summary of the arguments for and against plea negotiation, see G.A. Ferguson and D.W. Roberts, "Plea Bargaining: Directions for Canadian Reform", (1974), 52 Can. Bar Rev. 497.

158. The commonly cited figure is that at least 90 percent of Canadian criminal cases are resolved by guilty pleas. See Law Reform Commission of Canada, Working Paper #15, "Criminal Procedure: Control of the Process", Ministry of Supply and Services, Ottawa, 1975, p. 45. Although this figure is disputed by some: See Simon N. Verdun-Jones and F. Douglas Cousineau, "Cleansing the Augean Stables: A Critical Analysis of Recent Trends in the Plea Bargaining Debate in Canada", (1979), 17 Osgoode Hall L.J. 227. Research indicates that somewhere between 20 percent and 30 percent of guilty pleas are the result of plea negotiation. See Ferguson and Roberts, *ibid.*, as well as Richard Ericson and Patricia Baranek, "The Ordering of Justice", University of Toronto Press, Toronto, 1982, p. 178.

Solutions to crowded dockets other than guilty pleas are possible. Diversion of large numbers of cases away from the courts by police, or hiring large numbers of judges and prosecutors, come to mind immediately. Neither are as likely, however, as the continuation of some form of plea negotiation, and plea negotiation might well continue in the face of such reforms.

159. See *Perkins and Pigeau* v. *The Queen* (1976), 35 C.R.N.S. 222 at 226 (Que. C.A.); *Attorney General of Canada* v. *Roy* (1972), 18 C.R.N.S. 89 at 92 (Que. Q.B.); *R.* v. *Wood* (1975), 26 C.C.C. (2d) 100 at 108-109 (Alta. S.C.A.D.).

160. For cases which discuss judicial involvement in plea negotiations see: *R.* v. *Wood* (1975), 26 C.C.C. (2d) 100 (Alta. S.C.A.D.) and *R.* v. *Dubien* (1982), 27 C.R. (3d) 378 (Ont. C.A.).

161. *Attorney General of Canada* v. *Roy* (1972), 18 C.R.N.S. 89 at p. 93 (Que. Q.B.).

162. *Adgey* v. *The Queen* (1973), 13 C.C.C. (2d) 177 at p. 316 (S.C.C.).

163. See the Report of The Canadian Sentencing Commission, "Sentencing Reform: A Canadian Approach", Ministry of Supply and Services, Ottawa, 1986, especially Chapter 13, "Prosecutorial Discretion and Plea Negotiation".

important corrective to this danger is an enforceable policy of full disclosure as discussed in the previous section of this Part. However, this and other means by which to properly structure prosecutorial discretion in relation to plea negotiation will be discussed after a description of plea negotiation as it is currently practiced in Nova Scotia.

2.4.2 Plea Negotiation in Nova Scotia

In reviewing plea negotiation in Nova Scotia it will be helpful to first examine the official policy of the Attorney General's Department in comparison with the policies of other provinces, and then to see what the Crown and Defence Surveys as well as the other information available to this Royal Commission reveal about this policy in actual practice.

(a) The Advice to Prosecuting Officers on Plea Negotiation

The Attorney General's Department "Policy Statement: Negotiations with Defence Counsel Concerning Plea and Sentence" is found as Appendix 18 to this study. Plea negotiation with respect to three items is contemplated: pleas to lesser and included offences, guilty pleas in return for sentence recommendations and guilty pleas in return for withdrawal of other charges. Authority to conclude such negotiations is granted to prosecutors in a limited fashion. Assistant Prosecuting Officers are required to seek the approval of the Prosecuting Officer for the County prior to concluding negotiations. Prosecuting Officers must seek approval from the Director (Prosecutions) or Director (Criminal) for plea reductions in homicide cases, and even in sentencing bargains and agreements to withdraw multiple charges.

The statement contains no enunciation of the purpose of plea negotiation, and the contemplated categories of "bargain" may give rise to some confusion. No analysis is made of the situation where defence counsel may convince the Crown prosecutor that the accused has a complete defence or partial defence to the charge or the evidence is not sufficient to support the charges as laid. If an Assistant Prosecuting Officer were certain of the validity of the defence contentions, the proper course of conduct would be for him or her to withdraw the charges, see that charges were laid which were supported by the evidence, or accept a guilty plea to the lesser and included offence supported by the evidence. Would this be "plea negotiation" within the ambit of the statement which would require the Assistant Prosecuting Officer to seek the approval of the Prosecuting Officer for the County? One would hope not. If it were,

and were taken seriously by those in the field, the result would be a bureaucratic impediment to solving problems caused by police overcharging. However, the statement is worded in a sufficiently ambiguous fashion that Assistant Prosecuting Officers who are exercising their professional judgment on such questions in the hurried context of overcrowded court dockets might fear being rapped on the knuckles for making decisions which were not in accordance with their superiors. The implication of this approach, however, is that the purpose of the Nova Scotia advisory statement is to authorize the withdrawal or reduction of charges *which are substantiated by the evidence* simply to avoid a trial (and presumably without reference to the public interest factors discussed earlier which are nowhere recognized in the statement).

A comparison with policy statements from two other Canadian provinces is instructive on this issue of relating terminology to substance. The Manitoba Prosecutions Guidelines state that "all efforts should be made to plea bargain and obtain guilty pleas at the docket level".[164] However, the guidelines also make clear that the primary nature of this "plea bargaining" exercise is to ensure, by full Crown disclosure and subsequent discussions, that the charges laid are in accordance with the evidence and/or with legal principles prohibiting multiple convictions arising from the same matter. Reference is also made in the guideline to the abandonment of charges on "compassionate or humanitarian grounds" or where the furtherance of the prosecution would bring the administration of justice into disrepute".[165]

The New Brunswick Guidelines achieve roughly the same results but with a reversal of terminology (Appendix 20). The Crown prosecutor is forbidden to "plea bargain", but that term is defined generally as withdrawing charges which can be substantiated by the evidence simply to avoid trial or as offering other benefits on prosecution or sentence which would not normally follow if full disclosure of the facts were made in open court. An exception is made, however, where public interest factors such as expense, time or difficulty "dictate" and where the consent of the Deputy A.G., Assistant Deputy A.G. or D.P.P. is obtained. The New Brunswick guidelines also make clear, however, that the prosecutor can reduce charges (without seeking consent) where evidential problems are evident, but this is not called plea bargaining (although it would be in Manitoba). The New Brunswick Guidelines on Plea Bargaining do not address the issue of withdrawing multiple charges which are unsubstantiated by the evidence, presumably on the theory that with the mandatory screening of all charges by Crowns prior to their being laid by police, these problems do not arise.

164. Attorney General of Manitoba, Prosecution Guidelines, Guideline #72, dated January 5, 1983 and entitled "Procedure--Docket Operations in Provincial Court" and Guideline #62, entitled "Plea Bargaining and Sentence Recommendations" dated April 29, 1987 (Appendix 19).

165. Attorney General of Manitoba, Prosecution Guidelines, Guideline #62, dated April 29, 1987, and entitled "Plea Bargaining and Sentence Recommendations" (Appendix 19).

In comparison with the Manitoba and New Brunswick guidelines, the Nova Scotia statement appears fluid to say the least. No adequate definition of plea negotiation is given, no reference is made to problems concerning difficulties of proof, no public interest factors are enumerated, and no direction is made concerning procedural rules which may prevent multiple convictions arising out of one set of events. It is not a statement which carefully structures the exercise of prosecutorial discretion in relation to discussions on plea between defence and prosecutors. For this reason, one might expect to find in practice a good deal of variation from person to person or region to region in the way in which it is implemented.

(b) Plea Negotiation in Practice

The Crown and Defence Surveys reveal some interesting information about plea negotiation patterns in Nova Scotia. When asked, "How often are guilty pleas the product of plea negotiation", 37 percent of the Crowns said "frequently" while 57 percent of the defence counsel gave the same response. Two Crowns said it never happens, but there were no defence counsel who said that.[166] There were similar dramatic differences between Crown and defence counsel when each group was asked to estimate in percentage terms how often guilty pleas were the result of plea negotiation. A full 45 percent of the defence respondents said that more than half of the guilty pleas result from plea bargaining, while only 15 percent of the Crowns would have put the figure that high.[167] All respondents were giving impressionistic estimates, but one can safely conclude that "plea bargaining" of some sort is a frequent phenomenon in Nova Scotia prosecutions.

When asked, "how often do *you* initiate plea negotiations?", only 23 percent of the Crowns said they never did. Forty-four percent of Crowns said they did it on rare occasions, 30 percent said they sometime did, and one prosecutor said he or she frequently initiated plea negotiations.[168] This self-perception was roughly confirmed by the Defence Survey, where 69 percent of defence counsel said Crowns rarely or never initiate plea negotiations while only 5.9 percent said they frequently do and 26 percent said they do sometimes.[169] This might be thought to be a high level of prosecutor-initiated plea negotiation when the policy statement from the Attorney General's Department seems to be drafted in a manner which contemplates that defence counsel would take the initiative and Crowns might reluctantly respond. The fact that defence counsel do most of the initiating of plea negotiation is confirmed in the Defence Survey where 68 percent said they frequently or always initiated plea negotiation, 26 percent said they sometimes did, only six percent said they did it rarely and no one said they never initiated

166. Crown Survey Results, Question 27(a); Defence Survey Results, Question 12(a).

167. Crown Survey Results, Question 27(b); Defence Survey Results, Question 12(b).

168. Crown Survey Results, Question 28(a).

169. Crown Survey Results, Question 13(a).

plea negotiations.[170] These figures were roughly confirmed by Crown counsel in response to the question, "How often are plea negotiations initiated by defence counsel?".[171] One defence counsel commented: "Prosecutors in (one rural) county frequently initiate and participate in plea negotiations, whereas metro area prosecutors hardly ever do - you cannot reach them to do this."

The answers to survey questions asking each group to assess what motivates Crowns to plea bargain provide room for some interesting observations about how the stated plea negotiation policies work in practice. When asked whether uncertainty about the availability of sufficient proof to sustain a conviction led them to negotiate a plea, 55 percent of the Crowns said it did sometimes or frequently, while 45 percent said rarely or never.[172] On the other hand, only 14 percent of defence counsel said this was rarely or never a motivating factor for Crowns in their estimation, while 80 percent said it sometimes or frequently was, and six percent said it always was.[173] Certainly if the defence estimate is correct, and even if the more conservative Crown estimates are preferred, these figures might support the conclusion that there is considerable overcharging or unnecessary multiple charging occurring in the province. One Crown commented "Usually where the police have laid multiple charges based on the same facts - it amounts to overkill".

It is often alleged in the literature critical of plea bargaining that some charges are withdrawn or a charge is reduced in exchange for a guilty plea in order to cope with overcrowded dockets. This would be formally contrary to the Manitoba guidelines and allowable in New Brunswick with special consent. Whether this is an acceptable purpose in Nova Scotia is not clear on the face of the policy statement. It clearly gives rise to equality problems as between cases in the system, and whether it would be a justifiable limitation in a free and democratic society upon constitutional principles of fundamental justice would be a complex argument. When asked whether they have agreed to plea negotiation to prevent a backlog in case load on the court docket, 48 percent of the respondent prosecutors said they never do this while 31 percent said they did it on rare occasions with the remaining 21 percent saying they do it "sometimes".[174] However, only 20 percent of the defence counsel thought Crowns were not so motivated, and ten percent said prosecutors negotiate pleas for this reason "frequently".[175] One might be pardoned for suspecting a disingenuous under-reporting by Crowns on this issue, particularly in the light of the comment by one defence counsel who asserted: "The most effective way to plea bargain is to wait until the prosecutor is feeling the full burden of the morning docket and to use the heavy case load as a lever to negotiation".

170. Defence Survey Results, Question 14(a).

171. Crown Survey Results, Question 29(a).

172. Crown Survey Results, Question 28(b)(i).

173. Defence Survey Results, Question 13(b)(i).

174. Crown Survey Results, Question 28(b)(ii).

175. Defence Survey Results, Question 13(b)(ii).

Another discrepancy between Crown and defence perceptions is evident on the issue of getting bargained relief from aspects of a full prosecution in return for cooperation in the prosecution of others. This too is a matter upon which the Nova Scotia policy statement is silent, although it might be thought a residual "public interest factor" in New Brunswick necessitating special consent. When asked how often they negotiated pleas in order to gain the accused's cooperation in the prosecution of others, 54 percent of the Crowns claimed they never did this, 35 percent said they rarely do it, and 11 percent said they sometimes do it.[176] Six percent of defence counsel think that this situation motivates Crowns to initiate plea negotiation frequently, 28 percent think sometimes, 38 percent say rarely, and only ten percent of defence counsel think this never happens.[177] These figures lead one to think that this practice is not necessarily a rare occurrence. While such a policy may rationally be justified, it is the kind of thing which raises eyebrows publicly and ought to be dealt with openly rather than swept under a cloak of silence.

176. Crown Survey Results, Question 28(b)(iii).

177. Defence Survey Results, Question 13(b)(iii).

While the Crown and Defence Surveys did not explicitly deal with the exercise of prosecutorial discretion in relation to public interest factors, one question asked how often Crown initiated plea bargaining was motivated by a concern for the victim. One might expect this most often perhaps, in cases of child abuse or sexual assault. On this, the perceptions of defence and Crown counsel were essentially similar. Among Crowns this is a motivating factor frequently for 14 percent of respondents, sometimes for 58 percent, rarely for 23 percent and never for only five percent.[178] While this may reflect an entirely appropriate balance of the public interest in shielding victims from needless trauma against attempting to convict an accused of a "full" offence or to do so with no reservations on sentence, the matter is not addressed in the plea negotiation policy statement. Considerable variability in the administration of justice may result.

178. Crown Survey Results, Question 28(b)(iv); Defence Survey Results, Question 13(b)(iv).

Equally interesting answers emerge from the Crown and Defence Surveys when examining what happens when the shoe is on the other foot - that is, how Crowns and defence counsel perceive the motivation of defence counsel who initiate plea negotiation. Both groups are in general agreement that defence counsel are motivated always or at least frequently to minimize the length and severity of the accused's sentence. Sixty-two percent of prosecutors and 80 percent of defence counsel were of this view.[179] For this to work as a strategy, there must be significant overcharging and/or docket pressure relief as significant factors motivating the Crown. Otherwise, the Crown could merely make full disclosure, and assume that the defence might wish to plead guilty in order to obtain a faster and less expensive procedure. However, a full 58 percent of defence

179. Crown Survey Results, Question 29(b)(i); Defence Survey Results, Question 14(b)(i).

counsel stated that getting a faster and less expensive procedure was rarely or never a motivating factor for them, and only four percent said it always was.[180]

Crowns and defence were asked, in addition, about two other factors which might be thought to motivate defence counsel to initiate plea negotiations. The first is the extent to which this is done to permit the accused to avoid the disgrace of a public trial. Only ten percent of the defence counsel said this was a frequent motivating factor while 75 percent said it was rarely or never the case.[181] Crown counsel tended to think that the defence was motivated for this reason more often than that.[182]

The final motivating factor about which respondents were quizzed was the extent to which defence counsel might be motivated to negotiate a plea in order to quickly dispose of an unwanted, unprofitable or difficult case. This concept, of course, raises the spectre of defence counsel persuading their clients to accept a plea to a lesser and included offence when there might be a legitimate defence available on the facts. To the extent that this latter scenario is a possibility, a defence counsel engaging in such practice would be contravening professional ethical standards, and could be disciplined or perhaps sued.[183] Not surprisingly, several defence counsel in voluntary comments on the Defence Survey questionnaire suggested that they would never "negotiate unless a client specifically admits guilt and there are no legal arguments affording an opportunity for an acquittal". This is the ethically correct stance. It is surprising, therefore, that only 70 percent of defence counsel responded that they would never negotiate deals to quickly get rid of an unwanted, unprofitable or difficult case![184] Twenty-two percent of defence counsel admitted that they did this on rare occasions, and eight percent said, perhaps more casually, that they did it "sometimes". One defence respondent said the issue was "bothersome". He or she said, seemingly in mitigation: "Caseload, however, at legal aid sometimes requires a plea negotiation with less than adequate information". Crown estimates of the frequency of the motivation being at play were even higher: eight percent thought it occurs frequently, and only 12 percent thought it never occurs.[185] While these figures might be thought to point to the existence of some shocking defence counsel practices, they also redound to the discredit of a prosecutorial system which promotes inappropriate plea negotiation. Moreover, this may have an important influence upon the way in which Crown prosecutors discharge their obligations to the court. This matter will be explored in greater detail below.

The final issue relating to plea negotiation about which a series of questions were asked to both Crown prosecutors and defence counsel might be called, for shorthand reference, the "negotiating

180. Defence Survey Results, Question, 14(b)(iii).

181. Defence Survey Results, Question, 14(b)(ii).

182. Crown Survey Results, Question 29(b)(ii).

183. Canadian Bar Association, Code of Professional Conduct, Ottawa: CBA, 1974, Ch. VIII, "The Lawyer as Advocate", 27-35.

184. Defence Survey Results, Question 14(b)(iv).

185. Crown Survey Results, Question 29(b)(iv).

chips". That is, what are the specific benefits sought or offered in the process of plea negotiation? It would appear that the most frequently sought benefits in the plea bargaining process are the withdrawal of other charges and a favourable recommendation as to the severity of sentence. Forty-four percent of the Crowns and 63 percent of the defence counsel in the surveys said that withdrawal of other charges are *frequently* sought in return for a guilty plea. The remainder said that withdrawals are "sometimes" sought, with the exception of one lone Crown who said this was never done.[186] This heavy emphasis in the responses on withdrawals is another indication that there is significant overcharging occurring in the system. Ninety percent of the Crowns and 90 percent of the defence counsel agree that a favourable recommendation on sentence is frequently or sometimes sought or offered as a benefit in return for a guilty plea.[187] In contrast with this information on withdrawals and sentence recommendations, it appears that a reduction of a charge to a lesser or included offence is not as popular a bargaining chip. While only about ten percent of Crowns and defence counsel said this was rarely or never sought, there was a greater tendency to put this benefit in the "sometimes" rather than the "frequently" category[188] in comparison with the two items discussed previously.

It should not be surprising that withdrawals, sentence recommendations and lesser offences are the three chips most frequently negotiated, and that these are the ones mentioned in the province's policy statement. What is perhaps surprising is the relative frequency of reference to withdrawals and sentence recommendations given that these chips, according to the policy statement, can only be bargained with the approval of the prosecuting officer or someone in the Attorney General's Department. With the pressures of the normal workload on prosecutors, one would suspect that many agree to withdrawals or make agreed upon sentencing recommendations without "head office approval". Some support for this proposition can be found in the Crown Survey results. Crowns were asked how often they would discuss a plea negotiation with a list of specified people which included "a Prosecuting Officer", "the Director (Prosecutions)" and "the Director (Criminal)".[189] With heavy use of withdrawal and sentencing recommendations on plea bargaining, one might have expected many respondents to say they "frequently" contacted a Prosecuting Officer or "sometimes" contacted one of the Directors. However, 40 percent of the Crowns said they rarely or never contacted the Prosecuting Officer and 40 percent said they did it only "sometimes". Only 12.5 percent said they did it frequently and 7.5 percent "always". Similarly, almost 80 percent of respondents said they rarely or never (35 percent) contacted the Director (Prosecutions) and only one Crown said he or

186. Crown Survey Results, Question 30(a)(ii); Defence Survey Results, Question 15(a)(2).

187. Crown Survey Results, Question 30(a)(iii); Defence Survey Results, Question 15(a)(iii).

188. Crown Survey Results, Question 30(a)(i); Defence Survey Results, Question 15(a)(i).

189. Crown Survey Results, Question 31.

she did it frequently. Even fewer respondents appear to contact the Director (Criminal). It is difficult to resist the conclusion that the apparently elaborate hierarchial control of plea negotiations established by the policy statement is simply not working in practice. Crowns in the field would seem to be responding in an ad hoc fashion to the pressures upon them, with the knowledge that they may be left "twisting in the wind" if they make a subsequently controversial decision other than in accordance with the procedures in the policy statement.

It is also evident from the Crown and Defence Survey results that a number of other negotiating chips, not mentioned or "authorized" by the policy statement, are in play during the plea negotiation game in practice. The option to proceed by summary conviction as opposed to indictment in hybrid offences (of which there are large numbers in the *Criminal Code)* is a case in point. Only 37 percent of Crowns and 30 percent of defence counsel said this benefit was never or rarely in play, despite official silence about it in the "Advice to Prosecuting Officers".[190] Other benefits about which both groups were asked were a favourable Crown stance on bail, a promise not to seek a harsher penalty for second convictions, a promise not to force a jury trial, a promise not to charge friends or family, and particular regimes of treatment in sentencing. None of these are covered in the Attorney General's policy statement on plea negotiation but in each case a small though significant group of respondents answered that these were benefits offered or sought in the plea negotiation process.[191]

190. Crown Survey Results, Question 30(a)(iv); Defence Survey Results, Question 15(a)(iv).

191. Crown Survey Results, Question 30(a)(v)-(ix). Defence Survey Results, Question 15(a)(v)-(ix).

2.4.3 Reform of Plea Negotiation in Nova Scotia

In its earlier work, the Law Reform Commission of Canada advocated the abolition of plea bargaining in Canada.[192] These abolitionist views were strongly criticized in part because many think that abolition would be impossible, and in part because many fear that the evils which would be created by attempts at abolition would be substantial.[193] The Law Reform Commission of Canada is now apparently moving toward what might be called a "qualified retentionist view".[194] In the meantime the Canadian Sentencing Commission has made strong recommendations concerning the retention of plea negotiation as an element of the criminal justice system but under more closely regulated circumstances.[195] Their recommendations are found in Appendix 21 of this Study.

The Law Reform Commission of Canada has correctly identified the principles which ought to govern the plea negotiation process as openness, voluntariness, accuracy and appropriateness, equality, enforceability and judicial supervision.[196] The Commission offers

192. Law Reform Commission of Canada, "Criminal Procedure: Control of the Process"; Working Paper #15, Ottawa: Information Canada, 1975.

193. *Supra*, footnote 163

194. Marc Schiffer, "Plea Discussions and Agreements" [Unpublished Draft Working Paper, prepared for the Law Reform Commission of Canada (subject to revision)] Ottawa: June 23, 1988

195. *Supra*, footnote 103, pp. 414-427.

196. *Supra*, footnote 104.

compelling arguments that adequate regulation of plea negotiation as an integral part of our criminal justice system will require new statutory provisions which ought to be placed in the *Criminal Code*. However, the principles of openness, voluntariness, accuracy, appropriateness, and equality can be achieved in some measure through more adequate prosecutorial guidelines promulgated by the Attorney General in Nova Scotia. The Manitoba Guidelines (found in Appendix 19) and the New Brunswick Guidelines (in Appendix 20) both provide models which would be an improvement over the present Nova Scotia Policy Statement, although these two models take very different approaches to the definition and regulation of plea negotiation.

With all due respect to the efforts made in New Brunswick to control and limit plea bargaining, the narrowness of that province's definition of the practice means that there can be many circumstances where charges are legitimately altered subsequent to discussions between Crown and defence but which would not be called "plea bargaining" under the guidelines. Most members of the general public, to say nothing of many members of the legal profession, might find such distinctions difficult to follow. The result, if such a system were adopted in Nova Scotia, might be the formal banning of "plea bargaining" but the inevitable retention of other kinds of "plea discussions" with attendant misunderstandings and misperception which could bring the administration of justice into further disrepute. The better course of action is to adopt a policy which accepts the inevitability of plea discussions and plea agreements, and which controls and regulates this conduct in the interests of fairness and justice between the parties, as well as in accordance with public perceptions of these values.

The recommendations proposed earlier on post-charge screening and on disclosure would have an impact on plea negotiation as it seems to be occurring in Nova Scotia as revealed by the survey data. The implementation of post-charge screening should have the result of reducing unnecessary multiple charging. Similarly, full disclosure will reduce the occurrence of improperly obtained guilty pleas where the Crown is "bluffing" about the strength of its case. However, implementation of these recommendations would not adequately control the plea negotiation process by giving direction to Crowns. Nor would they reassure the public about the legitimacy of the process, or bring it out into the open so that it can be dealt with under public scrutiny.

Certain aspects of plea negotiation, particularly relating to the "enforceability" of plea bargains, and the proper role (if any) for judges in this process can be definitively regulated only by the Federal Government. They are matters of criminal procedure under

federal legislative authority pursuant to Section 91 (27) of the *Constitution Act, 1867* and should be dealt with by amendments to the present *Criminal Code* or in a new Code of Criminal Procedure. Other aspects of plea negotiation, however, relate to the exercise of prosecutorial discretion by the Attorney General or his agents. These aspects can be the subject of guidelines which would legitimate plea discussion and plea agreements undertaken in authorized circumstances and in accordance with principles established in such guidelines. The recommendations which follow recognize this division of authority. More importantly, the guidelines are drafted in language compatible with recent proposals under discussion within the Law Reform Commission of Canada which may become the basis for changes in federal legislation or criminal procedure.[196(a)]

196(a). *Supra*, footnote 194

Recommendation 14

That the Attorney General of Nova Scotia should support efforts to ensure that the process of plea discussion and plea agreement be made the subject of statutory regulation and control in the Criminal Code, *in order to attain enforceability of outcomes in an open, voluntary, accurate and fair manner.*

Recommendation 15

That the following guidelines, as a minimum, be issued to Crown prosecutors as the basis for the exercise of their prosecutorial discretion in relation to plea discussions and plea agreements:

(a) In the interpretation of these guidelines, the following definitions are applicable:

(i) "plea agreement" means any agreement by the accused to plead guilty in return for the promise of some benefit;

(ii) "plea discussion" means a discussion directed toward the conclusion of a plea agreement.

(b) Plea discussions may be undertaken by prosecutors under the conditions set out in these guidelines, in order to establish plea agreements in the manner required by these guidelines.

(c) A prosecutor shall not in plea discussions, suggest, conclude or participate in any plea agreement that:

(i) requires the accused to plead guilty to an offence not disclosed by the evidence; or

(ii) requires the accused to plead guilty to charges that inadequately reflect the gravity of the accused's proveable conduct, unless such a plea is based on one of the public interest factors

identified in recommendation 11, or is otherwise justifiable in the interest of the administration of justice or the protection of society.

(d) A prosecutor shall not involve any judicial officer in plea discussions or plea agreements, except that the prosecutor and an accused who have concluded a plea agreement shall, before the plea is entered, disclose to the court:

(i) the nature of and reasons for the agreement, and

(ii) whether any previous plea agreement has been disclosed to another judge in connection to the same matter and, if so, the nature of the agreement.

(e) The disclosure and reasons given in paragraph (d) shall be made in open court, unless compelling reasons such as the likelihood of serious harm to an accused or another person, require otherwise.

(f) A prosecutor shall not, when there is an alternative, have plea discussions with an accused in the absence of the accused's counsel.

(g) A prosecutor with whom an unrepresented accused wishes to have plea discussions shall inform the accused that:

(i) representation by counsel may be advantageous to the accused; and

(ii) if the accused cannot afford to retain counsel, he or she may be able to obtain assistance from an appropriate legal aid service.

(h) A prosecutor shall be careful to ensure that accused persons in similar circumstances receive equal treatment in respect of plea discussions and plea agreements.

i) In complying with the guidelines on plea discussion and plea agreements, a prosecutor shall ensure that there has been compliance with the guidelines based on recommendation 13 concerning disclosure of the Crown's case to the accused.

(j) During plea discussions, the prosecutor shall:

(i) never suggest the laying of charges not believed to be supported by provable facts;

(ii) never suggest the laying of any charge not usually laid in relation to the accused's alleged conduct unless in accordance with the public interest factors of Recommendation 11;

(iii) never suggest that a plea of not guilty will lead the prosecutor to seek a heavier penalty than that normally obtained in such circumstances;

(iv) never make any material misrepresentation;

(v) never attempt to persuade the accused to plead guilty in the face of continued denials of guilt; and

(vi) never make any offer or promise unrelated to the prosecutor's proper function.

2.5 Prosecutorial Discretion and the Conduct of a Criminal Trial

The heading for this section could accurately be used in relation to a whole series of tactical matters which confront Crown prosecutors when making pre-trial motions, examining and cross-examining witnesses, making objections on evidentiary issues, doing jury addresses and presenting arguments to the court. This section, however, has a more limited objective. Its purpose is to examine the relationships between the Crown prosecutor and two sets of key players in criminal trials: judges and defence counsel. A subsection will be devoted to each.

2.5.1 Crown Relations with the Presiding Judge

In our adversarial system of criminal justice, the reigning general principle is that the trial judge is to fulfill the role of neutral arbiter of the conflicting presentations of the Crown and defence, with a duty to ensure that each side abides by the rules in presenting his or her case. In circumstances where there is no jury (which, of course, represents the vast majority of criminal trials), the judge is not only the trier of the law but also the trier of fact - judging the credibility of witnesses, weighing the evidence and reaching the decision as to whether the Crown has proved its case beyond a reasonable doubt. The Crown and defence are generally free to present their cases in whatever manner they see fit, as long as they remain within the established rules of evidence and procedure. Judges intervene only rarely. It is, however, recognized that there may be a duty for the judge to intervene to protect the interests of the liberty of the subject where the theoretical balance of the parties is upset by the fact that an accused is unrepresented by counsel. It is axiomatic that the case is to be decided only upon the basis of relevant evidence presented in open court under public scrutiny and in the presence of the parties where objection can be taken by them to any alleged impropriety. The proceedings in open court are formal in nature, and a transcript of all which occurs is made and can be examined for errors by a court of appeal.

While the preceding 'potted' description of a criminal trial attempts to capture the essential core events, it does not deal with certain apparently peripheral or ancillary events which nevertheless have an impact on the proceedings, and which were the subject of inquiry during the research for this study. These are the impact of

pre-trial conferences, the preparation of summaries to judges of facts relied upon by the Crown in jury cases, the use of transcripts of preliminary hearings by trial judges, and general relations of Crown prosecutors with judges both inside and outside the courtroom. All of these issues will be addressed briefly here.

It has become common in criminal cases (but normally jury trials only) to hold a "pre-trial conference", the purpose of which, in the unproclaimed words of Section 625.2 of the *Criminal Code*, is "to consider such matters as will promote a fair and expeditious trial". Thus, the purpose is to see whether certain matters can be agreed upon so as not to waste valuable time on uncontested issues, and to apprise the trial judge of the case so that he or she can be prepared to make rulings on controverted evidential or procedural issues. These pre-trial conferences are a recent innovation, which in the absence of proclaimed legislation making them mandatory are still of a voluntary nature. However, Nova Scotia courts, like those of other provinces, have prepared rules governing their conduct in anticipation of the regulation being proclaimed which will make them mandatory in jury trials and optional in others.

While these pre-trial conferences are generally well received by judges and counsel alike, they are perceived by some counsel with trepidation. They prevent "trial by ambush" through giving counsel notice of how facts and issues are viewed by opposing counsel, but they remove some of the advantage which previously might have accrued to more experienced or more clever counsel who could better adapt to the vicissitudes of the older system. The meaning of pre-trial conferences must also be presented with some care to accused persons who may see the judge closeted in chambers with Crown and defence counsel as some sort of "rigging" of the trial.

Partly in relation to this possible negative perception by accuseds and the public, the Crown and Defence Surveys asked certain questions about pre-trial conferences. When asked how often they had participated in pre-trial conferences, over 40 percent of the Crowns and over 50 percent of the defence counsel responded rarely or never.[197] Presumably this reflects the fact that many per diems and full time Crowns assigned to Provincial Court never do jury trials where the convening of a pre-trial conference is a far greater likelihood. When asked to comment upon the value of pre-trial conferences, respondents gave an extremely broad range of answers. While most Crowns were positive about them, many felt they served little purpose other than assisting the trial judge (particularly if he or she had little criminal experience prior to appointment to the bench). On the defence side, many counsel were positive about the way pre-trial conferences helped to narrow the issues, but some were apprehensive about prejudicing the trial judge and making decisions

197. Crown Survey Results, Question 43(a); Defence Survey Results, Question 18(a).

behind closed doors. They also indicated their reticence in "opening-up" about their case in the absence of the accused.

When asked whether pre-trial conferences have an impact on plea negotiation, over 75 percent of the Crowns said this happens rarely or never, and 70 percent of defence counsel were of the same opinion.[198] This high percentage of answers in this range may reflect the fact that once counsel are taking a serious case to trial, the negotiating stage is generally over. It may also indicate a proper reticence to involve the judiciary in a plea bargaining situation. The remaining estimates, which all fell within the "sometimes" or "frequently" range, may result from changes of heart following more complete disclosure by the other side, but some defence counsel volunteered the information that judges sometimes tip their hand or display a significant attitude to the case which precipitates a negotiated solution. This latter situation, of course, gets very close to judicially supervised plea bargaining, and warning bells about inappropriately secret justice ought to ring. On balance, the results of the Crown and Defence Surveys do not seem to indicate abuse of the pre-trial conference procedure. However, consideration should be given to having pre-trial conferences conducted by a judge other than the one who will conduct the trial.

198. Crown Survey Results, Question 44(a); Defence Survey Results, Question 19(a).

Recommendation 16

That the Attorney General and the Chief Judges of the appropriate courts consider the feasibility of a system whereby a pre-trial conference might be conducted, in appropriate circumstances, by a judge other than the judge who will preside over the trial.

A related matter, however, which may give rise to serious concern is the preparation of "Summaries to Trial Judges" by the Crown. The summaries are prepared for judges in jury trials and ought ideally to contain a summary of the facts, and a brief on the law relevant to liability as well as to sentencing. They are sent to the Judge accompanied by a copy of the indictment (with witness list) and a transcript of the preliminary inquiry. These summaries have in the past served two functions: first, they were important in the now abolished grand jury proceedings in so far as they were used by the judge presiding at the assize to outline the nature of the case prior to the grand jury foreman taking over the proceedings in the jury room. Unlike other jurisdictions, Nova Scotian Crown counsel did not enter the grand jury room to present the case - the witnesses were led to the room and the grand jury functioned without immediate supervision or control. The instructions from the judge concerning the case prior to their entry into the room was all that grand jurors

received. Second, the summaries were, and apparently still are, valued by trial judges to orient their thinking about evidentiary rulings and other contentious procedural matters which may arise at or prior to the trial.

Appendix 22 consists of the "guideline" from the "Advice to Prosecuting Officers" on the preparation of summaries for trial judges in force when the Surveys were conducted (22(i)), as well as the statement or summary to the trial judge prepared by Donald C. MacNeil, the Prosecuting Officer in the trial of Donald Marshall, Jr. (22(ii)). It is to be noted that this original guideline makes no mention of a duty to disclose the document to defence counsel, and that the document prepared in the Marshall case asserts certain facts and puts interpretations on others which were contested at the trial and have been demonstrated by subsequent events to be false. Because of the evident potential for prejudice to an accused posed by these summaries to trial judges, both Crown and Defence Surveys sought information about them. However, subsequent to the circulation of the first draft of this study, the Attorney General issued a supplementary guideline relating to summaries to trial judges which is found as Appendix 22(iii). The effect of this memorandum on the problems identified in the study will be discussed below.

When Crowns were asked whether they had ever had occasion to prepare "Summaries for Trial Judges" only 19 percent said they had never done so and only 17 percent said rarely.[199] However, when those who had prepared such summaries were asked how often they made them available to defence counsel only 53 percent replied always. Fifteen percent of Crowns replied "never" to this question, nine percent said rarely and 24 percent said only frequently or sometimes. This low level of communication of summaries to defence counsel was confirmed by the Defence Survey. When asked how often the summaries were made available to them, 48 percent said never and only 19 percent said always.[200] One defence counsel said he or she had "found out about them by accident in my first jury trial".

199. Crown Survey Results, Question 42(a).

200. Defence Survey Results, Question 17(c).

When asked to comment on any problems associated with the presentation to judges of these summaries, defence counsel divided roughly equally into three groups. One group seemed to have little or no knowledge of the use of these statements, and another group thought that any potential problem with them could be rectified by the defence (which, of course, assumes a knowledge that they exist). The third group expressed great concern about the fact that the information contained in them would give a biased and "police-based" account which could prejudice the trial judge's perception of the issues with no clear corrective necessarily available from the defence.

The value of the summaries was the subject of mixed review from the Crowns. Some felt they were of value to trial judges while others felt they were of no value at all. Some suggested that they had outlived their usefulness now that the grand jury is gone and that pre-trial conferences are the order of the day. No Crowns gave convincing arguments which would dispel fears about potential bias from undisclosed partial or biased summaries, and it was clear that some accepted their usefulness only in the light of the fact that they themselves made full disclosure of them.

It may be helpful to speculate on what influence the summary prepared by Donald C. MacNeil may have had in the wrongful conviction of Donald Marshall, Jr. The summary does indicate on page three that "Mr. Chant first related to the police the story that the accused gave him, but later advised that he related the false story *because of fear of the accused*" (emphasis added). Throughout the trial, defence counsel were inhibited by the trial judge from pursuing cross-examination which would have enabled the defence to get at the issue of why the two purported eyewitnesses, Chant and Pratico, altered their stories at various points. This Royal Commission may conclude that it was police pressure rather than pressure from the accused which led to incorrect evidence from these two witnesses, but defence counsel were unable to explore this issue (assuming they desired to in this manner). The transcript also reveals that when in the *voir dire* concerning the questioning of John Pratico, Mr. Khattar sought to ask the witness *why* he had made contradictory statements, the trial judge stated "You don't want that answer, Mr. Khattar!" (Transcript p. 168). One may infer that the trial judge was trying to protect the accused from what he assumed would be an answer concerning the former's involvement in the threatening of witnesses. To what extent did the allegations of "fear of the accused" found in the "Summary to the Trial Judge" affect the judge's perception of the facts and colour his evidential ruling? The answer to the question is a matter of speculation, but to pose the question in the circumstances is surely an answer to those who suggest that undisclosed summaries to trial judges are "O.K." since in a jury trial the judge "only" uses them to help make evidentiary rulings.

Undisclosed "Summaries for Trial Judges" offend the basic principle that in criminal cases, like any adversarial trial, all the parties must be made privy to any information or argument given to the presiding judge. If material is presented to the judge in other than open court, copies must be available to the opposing counsel in sufficient time to be able to make objections, comments, or alternate submissions. Any other state of affairs must surely be contrary to the principles of fundamental justice enshrined in Section 7 of the *Canadian Charter of Rights and Freedoms*. The use of undisclosed

Summaries to Trial Judges in Nova Scotia prior to the Attorney General's memorandum of July 18, 1988 was simply shocking. The first draft of this study had recommended that "the submission of 'Summaries to Trial Judges' in Nova Scotia without timely submission of these documents to defence counsel be terminated forthwith". The new policy must be welcomed as a dramatic improvement over the pre-existing situation, although the memorandum of July 18 is ambiguous about the "timeliness" of the submission of the summary to defence counsel. Ideally, the document should be available to defence counsel in sufficient time before it is submitted to the trial judge that there might be agreed upon "corrections" where possible. Obviously, there will be many occasions where Crown and defence counsel will be unable to agree on matters which the Crown asserts it will be able to prove at trial. But in those areas where factual or other matters can be agreed upon, it may obviate the necessity for defence counsel to submit a written rebuttal to the trial judge prior to trial, or raise the issue as a preliminary matter at the outset of the trial. This issue is of sufficient importance to merit amendment to the new policy.

It might be argued that these summaries to trial judges ought to be abolished altogether. There is no statutory or common law source which explicitly supports their use. An informal canvas of Crown prosecutors from other Canadian provinces and jurisdictions indicates that Nova Scotia is the only province where "Summaries to Trial Judges" are prepared. They are simply a matter of practice in Nova Scotia based on a fairly long tradition. In effect, they are, in written form, the kind of statement which might be made by Crown counsel in his or her opening address to the jury. As such, they ought to be prepared with the same degree of care and circumspection necessary for an opening address. Otherwise, Crown counsel runs the risk of providing an accused with grounds for appeal in the event of conviction if it can be said that a summary improperly influenced the trial outcome. Given their apparent value to trial judges in the preparation for evidentiary and procedural rulings, given their possible value to an accused in demonstrating the Crown's approach to the case, and given the care with which they must be prepared in order not to give grounds for appeal, the continued use of 'summaries to trial judges' can be justified. However, the timeliness of their disclosure to defence counsel is key to such continued use if potential prejudice to the accused is to avoided. A recommendation on this subject is in order.

Recommendation 17

That guidelines to prosecutors concerning "Summaries to Trial Judges" require disclosure of summaries to defence counsel in time to allow for amendment, prior to their submission to the trial judge where possible, and in any event, to allow defence counsel time to respond in an appropriate manner prior to the pre-trial conference or the commencement of the trial.

Before leaving the topic of the information provided to trial judges through existing authorized procedures, a word must be said about the use of transcripts of preliminary inquiries. When there has been a preliminary inquiry in the trial of an indictable offence, the transcript of that hearing is, pursuant to *Criminal Code* s. 551, sent to the clerk of the court in which the accused is to be tried. When the trial judge is sitting with a jury, it is sometimes said that his or her reading of the preliminary transcript will assist in dealing with the evidential and procedural rulings, but will not improperly affect the outcome of the trial since it is the jury which will decide the facts based on what they hear in open court - the jurors never see the preliminary transcript which is not, properly speaking, evidence at the trial itself. Different considerations apply when the trial is being held before a County Court judge or under the new procedures which allow trials of indictable offences in the Supreme Court (Trial Division) without a jury. Practices differ as between different County Court judges as how to handle this situation. Some County Court judges read the transcripts as a matter of course on the theory that they are a part of the record, are known and available to the parties, and will assist in understanding the facts and making rulings at the trial. Other County Court judges refuse to read preliminary transcripts as a matter of course on the theory that the facts contained therein are not part of the evidence in the trial (and indeed may contain inadmissible evidence), there is no duty upon the defence to cross-examine or present evidence at the preliminary, and a reading of the transcript may create a bias in the mind of the trial judge to the prejudice of an accused person.

Both Crown and Defence Survey results indicate that most Crowns and defence counsel believe that County Court judges read the preliminary transcripts most of the time.[201] Moreover, when asked whether the situation with the trial judges reading transcripts is satisfactory, the dominant view among both Crowns and defence counsel was that where the trial is a non-jury trial, this should not occur. For example, of the Crowns who offered opinions on this practice, 11 said it was improper and only four thought it acceptable. One Crown was moved to state "It is revolting for obvious reasons".

201. Crown Survey Results, Question 51(a)(i); Defence Survey Results, Question 20(a)(i).

Given the dangers to a fair trial which can flow from trial judges sitting without a jury reading transcripts of the preliminary inquiry, and given the apparently widespread nature of this practice, a recommendation from this Royal Commission would be appropriate. A suitable text might read as follows:

Recommendation 18

(a) That the Attorney General seek amendments to Criminal Code *Section 551 to the effect that the clerk or proper officer of the trial court is required to retain the transcript of the preliminary inquiry for distribution to the parties and for the purposes of the hearing, but that trial court judges sitting without juries are not to be given pre-trial access to the preliminary transcript.*

(b) That the Chief Judge of the County Court and the Chief Justice of the Supreme Court (Trial Division) bring to the attention of their colleagues the dangers of potential prejudice to accused persons posed by the reading of transcripts of preliminary inquiries in non-jury trials.

The final issue on the relations between Crown prosecutors and trial judges which will be canvassed in this section is of a more general nature. Concerns are raised from time to time that the informal relations which develop between a Crown prosecutor and the trial judge before whom that prosecutor frequently appears, may not always be in the interests of justice. A number of questions in the Crown and Defence Surveys were designed to elicit information on such matters. Crowns were asked to comment on the positive and/or negative aspects of appearing before the same judge for a prolonged period of time.[202] Among the positive comments the most frequent was that in "getting to know your judge" you are able to anticipate which arguments are successful and which are not, thus improving your chances of success and saving court time. In general, "when Crowns and judges know and respect one another, the courtroom runs more smoothly" - such was the dominant view. On the other hand, some Crowns suggested that when one has learned to read the judge's mind one becomes "stale and complacent", particularly when one knows the likely outcome is negative for your case. Futhermore, some Crowns develop animosities or personality conflicts with the judges before whom they regularly appear, and these relations are generally perceived to be dysfunctional on all counts. The most worrisome negative comments, although from only one respondent, came from the prosecutor who said that one "may become personally too close to the judge so that he or she may seek to consult privately and or the Crown may hesitate to object to or appeal judicial

202. Crown Survey Results, Question 8(d).

decisions for fear of repercussions in subsequent cases".

Defence counsel were asked if they had experienced difficulties when acting against a Prosecuting Officer who has appeared before the same judge for a prolonged period of time. The most frequent comment, which may reflect the obverse of the predominantly favourable Crown comments, was that the judge sometimes tended to "fill in the Crown's case", "to re-open the case" or "to grant greater latitude in evidentiary rulings than might be the case with, for example, per diem Crowns". Conversely, one defence counsel said that sometimes "familiarity breeds contempt" and that personal animosities between Crown and judge were sometimes evident.

A number of questions were asked in the Crown questionnaire concerning informal contacts between prosecutors and judges outside the courtroom. When asked "do you have social contact outside the courtroom with any of the members of the judiciary before whom you may be required to appear, over 70 percent replied never or rarely while the remainder fell basically into the "sometimes" category.[203] When asked to give examples of typical circumstances those who had such contact described the normal kinds of casual social contact one might expect of people in the same social class and profession, and sometimes in a small community. Examples included local bar meetings, church attendance, legal conferences and the like. Of a questionable nature, two mentioned the "police ball" and the "Annual Christmas party involving judges, defence counsel, police, probation staff, etc.".

203. Crown Survey Results, Question 49(a).

Another Crown questionnaire question asked "Do you ever have occasion to discuss outside the courtroom a particular case with the judge before whom the matter is being heard?" One sanguine Crown answered "Of course not. A ridiculous question." However, 24 percent of the Crown respondents said they did sometimes or on rare occasions.[204] A number of these said, "only after the trial is completed and the appeal period is over". But there were two more disturbing responses. One prosecutor said "A particular judge will phone or discuss in the courtroom corridor. In such cases I advise defence counsel of the discussion." And another said "A judge might occasionally mention a case while it is in progress ... I personally try to avoid such contact."

204. Crown Survey Results, Question 50(a).

While most of the Crowns presented an appearance of impeccable propriety in their own self-assessment on this issue, they were not so optimistic in the assessment of their fellows. When asked, "How often, in your opinion, do other prosecutors discuss particular cases outside the courtroom?", only 39 percent said never, 49 percent said rarely and 12 percent said sometimes. In general, however, it would seem that the relations between Crown prosecutors and judges are not anomalous. In those few cases where

there would seem to be problems, it appears to result from particular personalities, or the ethical standards of certain judges. Nevertheless a recommendation from this Royal Commission might help reduce what one hopes to be isolated instances.

Recommendation 19

(a) That guidelines be drafted by the Attorney General in the following terms:

(i) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of the prosecutor's jurisdiction. In such contacts the prosecutor must carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions and the Code of Professional Conduct require of counsel and judges.

(ii) A prosecutor must not initiate out of court contact with a judge during the course of a proceeding in the absence of defence counsel, and must decline such contact if initiated by a judge.

(iii) In the event that a prosecutor observes conduct on the part of a judge which the prosecutor believes to be improper or unethical, such incidents should be reported to the Director (Prosecutions) for possible referral to the Judicial Council.

(b) That the Chief Judges of the Provincial Court, County Court and Supreme Court bring to the attention of their respective colleagues the dangers of conduct which is, or might be perceived to be, improper contact with prosecutors, police, defence counsel or other participants in the criminal justice system.

2.5.2 Relations with the Accused and Defence Counsel

The foregoing discussions on disclosure and plea bargaining have not exhausted the topic of relations between the Crown and accused or defence counsel. This section is intended to focus on Crown Survey questions dealing with the effect on the prosecutor's conduct of the trial in the presence or absence of defence counsel and the quality of defence counsel in a particular case. The responses to these questions reveal an interesting divergence of attitudes among prosecutors.

In answer to the question "does your conduct of a prosecution differ according to whether an accused is represented or unrepresented by counsel?" a full 45 percent replied "never" and a further 17 percent said rarely.[205] Presumably these respondents would be among those who in the open-ended questions volunteered

205. Crown Survey Results, Question 45(a).

such comments as "the Crown's case is the Crown's case" and "the burden of proof is the same". On the other hand, 17 percent said their conduct of the case always or at least frequently differs when the accused is unrepresented. Supporting justifications for such a position included such statements as: "... the Crown has more of an obligation to see that all relevant parts both for and against the accused are presented to the court" and "... may tend to bend over backwards to insure that the accused is treated fairly ...", and "that the accused understands procedure and evidence".

A similar split among Crowns shows through in answers to the question, "Does your conduct of a prosecution differ in relation to what you perceive to be the degree of competence or incompetence of defence counsel." A full 44 percent of the Crowns said their conduct never differs and a further 23 percent said it rarely does.[206] One said, "I still need to prove my case", and again "the burden of proof is the same". However, the comments also revealed that sometimes the Crown will assist a particularly incompetent defence lawyer, and very often Crowns are frustrated by the "quagmires" into which an incompetent counsel may drag the trial. Competent defence counsel seem to lead Crowns to be tougher or more "on-the-bit" and, perhaps paradoxically, more likely to get agreement on various issues.

206. Crown Survey Results, Question 46(a).

In both the question on representation and that on competence, the high proportion of Crown counsel who responded, essentially, "it doesn't matter", is disturbing. If this response flows from a "win at all cost" attitude, it shows an unethical orientation to the role of the Crown prosecutor.[207] If the response is simply a thoughtless or uncaring attitude to the needs of the many unrepresented accused persons, it is an unprofessional approach which may bring the administration of justice into disrepute. One might be forgiven for wondering why Crowns who took such a hard-nosed attitude in relation to the conduct of prosecutions against unrepresented accused did not reply differently to question 52 of the Crown Survey. When asked whether the rule that "a prosecutor's prime duty is not to get a conviction but see that justice is done through a fair trial on the merits" would be "damaging to crime control if put in practice", no one answered that they thought this would be the case. While it is obvious that a Crown prosecutor cannot act as defence counsel too, it may be that a more explicit guideline from the Attorney General's Department on dealing with the unrepresented or "under-represented" accused would be of benefit. A recommendation in the following form from this Royal Commission would be apposite:

207. See the passage from *Boucher v. The Queen* cited in the job description for the Prosecuting Officer which is Appendix 9 to this study.

Recommendation 20

That the Attorney General's Guidelines to Prosecuting Officers include an explicit statement concerning proper conduct of trials involving accused persons who are unrepresented by counsel or whose counsel is not providing what the prosecutor considers to be adequate representation in the circumstances.

2.6 Political Interference with the Prosecutorial Function

No observer of Nova Scotian public events over the last decade could have failed to notice the recurring theme of alleged partisan political interference in the administration of criminal justice. The names Thornhill, MacLean, MacIsaac, Barrow and MacDonald are alongside that of Marshall in questionnaire responses in this study which voice concern about the appearance of partisan interference in the prosecution process. This Royal Commission has had the opportunity to gather information on some of these celebrated cases in order to determine whether the allegations in relation to them have any foundation in fact. The Crown and Defence Surveys, along with the other research conducted for this study, unearth little concrete information which would indicate any widespread partisan political interference with particular criminal prosecutions. They do reveal, however, that there is a widespread perception among defence counsel and a few Crowns of partisan abuse which may bring the administration of criminal justice into disrepute. Furthermore, it is demonstrated that at the critical junctures in the prosecution process, there are not administrative structures and policies in place which will allow the Attorney General's Department to refute even unfounded allegations of partisanship in a manner which could command public confidence.

The purpose of this section is to review the critical moments in the prosecution process, and critical aspects of the prosecution service which relate to this issue of alleged partisan political interferences in criminal prosecutions. Four issues will be addressed which have been considered from different perspectives earlier in this study. These are the hiring and firing of Prosecuting Officers, the laying of criminal charges, the control and direction of prosecutors, and alternative institutional structures for dealing with politically sensitive cases.

2.6.1 The Hiring and Firing of Prosecutors

That there has been some political influence in the hiring of some prosecutors is beyond question. One Crown respondent stated that he or she was "a political appointee" and another said he or she obtained the job through "the local Tory council" [*sic*]! There is also at least one example of a son of a prominent politician being hired as a prosecutor which, regardless of the merits of the appointment, cannot help raise eyebrows unless it can be shown that there was a hiring process which was scrupulously free of political influence.

The procedures used until recently by the Attorney General's Department in hiring its prosecutors were described earlier. As was mentioned, the distinction between Order in Council appointments and Civil Service Commission appointments has been perceived publicly and in the legal profession as being critical to the political nexus in hiring. This perception derives primarily from the fact that the Order in Council appointments have been made relatively quickly and without public advertising of the availability of the position. However, the procedures described show that even the process for Civil Service Commission appointments cannot be shown to be free from political influence. While the Civil Service Commission advertises and submits names to the Department, the practice has been that names can be added to the list by the Department at the final stages. Whether or not the Attorney General or Deputy Attorney General has or does intervene on a partisan political basis to fill vacancies by trumping the Civil Service Commission's process is not really the point. The problem is that the system as it has traditionally operated cannot be shown to exclude such a development. Moreover, the *Prosecuting Officers Act* (Appendix 3) reinforces the formal appearance of potential partisan abuse by making no reference to the Civil Service Commission and by stating that "the Attorney General shall appoint ..." Prosecuting Officers and Assistant Prosecuting Officers.

The termination of appointments is subject to the same kind of uncertainties with regard to partisan political interference. The Director (Prosecutions) stated in an interview[208] that he could only remember one occasion, or perhaps two, where a full time Prosecuting Officer was dismissed following a change in Government. The Executive Director (Administration and Finance) was of the view that full time Order in Council appointees and full time Civil Service Commission appointees are treated the same way and have the *same* security of tenure.[209] This is correct. Under the *Prosecuting Officers Act*, neither category has any security of tenure. Either "may be removed from office at any time by the Governor in Council on a report from the Attorney General." Given the political

208. Interview by author with Mr. Martin Herschorn, Director (Prosecutions), February 22, 1988.

209. Interview by author with Mr. R.A. MacDonald, Executive Director (Administration and Finance), February 23, 1988.

furor that a firing of a full time Prosecuting Officer might cause, it is easy to see why this provision would not have received frequent abuse for partisan reasons. The process of political discrimination concerning per diem Prosecuting Officers could be more subtle. If not assigned cases, the per diems are not paid. A per diem could merely be allowed to wither on the vine. In any event, the research for this study paper in relation to firing, like hiring, does not show any widespread partisan influence. However, in the absence of any provisions concerning dismissal for just cause or any other kind of procedures for security of tenure, an alleged "political firing" would be difficult to disprove.

Given the apparent lack of public confidence in the impartiality of the prosecution service of the Province of Nova Scotia, this Royal Commission should make, in the light of the foregoing analysis, the following recommendations:

Recommendation 21

That in order to maintain public confidence in the political impartiality of the hiring, firing and treatment of prosecutors:

(a) The Prosecuting Officers Act *be amended to make reference to Civil Service Commission standards and procedures in the appointment and termination of appointment of Prosecuting Officers and Assistant Prosecuting Officers; and*

(b) Administrative procedures be put in place by the Department of Attorney General in conjunction with the Civil Service Commission by which any partisan political bias, or appearance thereof, in the employment of prosecutors may be avoided.

2.6.2 The Laying of Criminal Charges

Persistent public rumours in both the Thornhill and MacLean affairs suggested that police investigators wished to lay criminal charges, and that the Attorney General's Department wished to discourage this. In both cases this state of affairs, if true, has been characterized by critics as being potentially based on partisan political considerations. The public hearings of the Royal Commission have shed light on these allegations. But the absence of a clearly articulated policy on who controls the charging process, police or agents of the Attorney General, will prevent the Attorney General's Department from being able, convincingly, to show such critics to be wrong if similar events are to be alleged in future. The relationship between Crown screening of charges and giving advice

in drafting informations on the one hand, and the right of peace officers like all citizens to lay criminal charges on the other has been discussed earlier. Suffice it to say that the preceding discussion on this topic takes on greater amplitude when placed in the context of alleged partisan political abuse.

Of course, merely to say that individual peace officers have the right to lay charges despite the views of the Crown is to ignore the employment context in which police officers work. A police officer is subject to hierarchical discipline and control. If the Attorney General's Department and the senior officers of a police force agree on a certain course of action with respect to laying of charges, an investigating officer who disagrees has the choice of complying with superior orders or putting his or her job on the line by laying charges. If checks and balances between institutional relations are desirable as suggested earlier, then the newly proposed responsibilities of the Solicitor General's Department for policing can only be seen as a healthy development.

2.6.3 The Control of Prosecutors in Political Cases

The Crown Survey asked respondents whether there are "written or unwritten understandings with the Attorney General's Department concerning the prosecution of "public figures" or controversial cases. The question was asked with the knowledge that there are no "public interest guidelines", in the sense discussed earlier, in the volume of *Advice to Prosecuting Officers*. The overwhelming response (93 percent) was that such a written or unwritten understanding does not exist, although two prosecutors said "yes" and one said "it depends".[210] Those who answered yes were asked to "explain". One said "File should be sent to superior and possibly up the chain of command for decision ...", and the other said "Unwritten - understood that Department should be acquainted with any situation such as above". The problem with the question is that it does not elicit information on whether in the absence of "a written or unwritten understanding" a prudent prosecutor would seek advice from a superior as a matter of caution in protecting him or herself from criticism. Moreover, it does not in any way address the problem of "public interest guidelines" and what extraordinary measures a prosecutor *should* take in cases involving public figures or public controversy - if anything.

210. Crown Survey Results, Question 47(a).

While the survey results do not indicate regular partisan political interference with the prosecution process, they do indicate that it may be a factor in isolated cases. Evidence heard in the public hearings conducted by this Commission into the Thornhill and MacLean affairs confirm that in those instances, where the political

stakes were high, the Deputy Attorney General took special measures. In a system where his or her tenure in office is not protected, a deputy Attorney General may feel explicit or implied pressure to shield his or her political masters from damage which would arise from the normal operation of the prosecution process. The present prosecution service is not structured in such a way that the Deputy Attorney General and those under his or her command are shielded and seen to be shielded from overt partisan political interference or even subtle pressures in that direction.

2.6.4 Alternative Models for Reform and the D.P.P.

At this time it is necessary to return to the Crown and Defence Survey results to the question which asked "Do you think there ought to be a 'special prosecutions' unit in the Attorney General's Department which would prosecute particularly complex or sensitive cases?"[211] The question was broad and the notion of a "special prosecutions unit" was left undefined. However, as indicated early, the Crown and Defence Survey results both indicated a majority in favour of such a unit, although it is necessary to turn to the volunteered comments to interpret these results. Of the Crowns who favoured the creation of a special unit, most did on the basis that a permanent organization would be valuable for complex cases. Those who favoured it for "political" cases seemed to have in mind the model of an ad hoc prosecutor, separated from the Department of Attorney General, who would not have to fear Departmental repercussions for prosecuting government figures. Some of those Crowns who opposed use of a special unit for dealing with charges involving political figures felt that such an organization would still be subject to the control of the Attorney General, a politician, and that such a development would not improve the present situation. Others objected on the grounds that a special unit for prosecution of political figures would perpetuate the impression of two standards of criminal justice.

Respondents in the Defence Survey expressed somewhat greater unanimity in their reasoning on pros and cons of a "special prosecutions unit". Of those who favored the concept, the vast majority (almost 75 percent) did so in relation to a perceived need to polish the image of the administration of criminal justice given its tarnished state of alleged political abuse. Of those who opposed the idea of a "special prosecutions unit", most focussed on the perception of partisan political abuse but were of the opinion that an independent prosecutorial office or a Director of Public Prosecutions was the preferable route to take.

211. Crown Survey Results, Question 47(b); Defence Survey Question 21(a).

Given the ambiguous nature of the question on the 'special prosecutions unit' and the complexity of the volunteered comments it may only be safe to make the following generalization. A large number of both Crowns and defence counsel believe that the prosecution service of the province ought to be restructured, and a major reason for this opinion is a desire to ensure that the administration of criminal justice in Nova Scotia be freed from the negative public perception that there is one law for the friends of Government and another for the rest of the people of the province.

The broad issue of alternative models for reform of the Attorney General's Department and its control over the prosecution process is the subject of another study for this Royal Commission by Professor John Ll. Edwards. However, it may be useful to indicate how the research results of this study may contribute to the debate on that topic, even if in a summary fashion. Three models for reform are most relevant for consideration in relation to the research conducted here. They are (a) an ad hoc special prosecution system, (b) a permanent special prosecutions unit, and (c) a restructured system of departmental responsibilities involving an "independent" Director of Public Prosecutions.

The ad hoc system of special prosecutors is that which has been adopted in the United States.[212] Such a system could be instituted as a matter of general policy in Nova Scotia using the existing provisions of the *Prosecuting Officers Act*. The provisions, described earlier, have been used recently in the prosecution of certain political figures, a member of the Attorney General's Department, and for inquiries where there is some suggestion that there may have been wrongdoing on the part of the police.[213] The advantage of this system over simply using a regular Crown prosecutor is that the special prosecutor has no direct institutional entanglements with the Attorney General's Department which might inhibit his or her freedom of action. The major disadvantage, however, is that such appointments inevitably follow after the events under investigation, and if the Attorney General's Department or a government official is under investigation it is difficult to avoid the public perception that the government has still hired a friend to act in these awkward circumstances. Furthermore, as American experience demonstrates, and the Nova Scotian legislation confirms, there is no security of tenure for the special prosecutor.

The Manitoba system provides a domestic model for a permanent special prosecutions branch. The Manitoba group is entrusted complex commercial cases, cases which are likely to be sufficiently protracted as to cause administrative problems for the regular system, inter-provincial and international criminal law matters, and "sensitive" cases including those involving government officials,

212. See Professor Edwards' opinion to this Royal Commission describing and evaluating such a system.

213. Telephone interview with Mr. Martin Herschorn, Director (Prosecutions) on May 17, 1988.

peace officers and members of the judiciary. Manitoba Guideline 13 describing this system is found as Appendix 23. There may be sound reasons to have such a specialized branch for many of the complex situations listed. However, as long as there is no way to insulate such a unit from the direct control of a partisan Attorney General or a compliant Deputy Attorney General, it is difficult to see how this system provides an improvement in relation to the problem under discussion here.

It is difficult to avoid the conclusion that a system of prosecution with a quasi-independent Director of Public Prosecutions is the best solution. A D.P.P. must be a person of respected professional standing and experience, appointed with security of tenure like that of a judge, able to exercise his or her best professional judgment free from partisan political considerations, and under a duty to report annually on prosecutions to the Legislature. In order to maintain political accountability in the administration of justice, a D.P.P. would be under a duty to consult with the Attorney General and could be overruled by the Attorney General. But such differences of opinion would be matters of public record. Such a system maintains prosecutorial independence yet combines it with political accountability. Moreover, it would not be incompatible with "ad hoc special prosecutors" or a permanent "special prosecutions unit" where circumstances justified these options (such as charges against someone under the D.P.P.'s control).

Readers are urged to examine in detail the opinions of Professor Edwards to this Royal Commission which compare the experiences of England, Ireland, Australia and other Commonwealth countries concerning the office of Director of Public Prosecutions. The following recommendations, however, present the views of the author of this study (which are in the main similar to or compatible with those of Professor Edwards) on the manner by which to structure the administration of public prosecutions in Nova Scotia. The purpose of these recommendations is to achieve a system which will be as free as possible from partisan political interference in the administration of criminal justice, while maintaining the principle of ministerial accountability to the provincial legislature which is essential for our democratic process.

Recommendation 22

(a) That there be created by an act of the provincial legislature the office of Director of Public Prosecutions, and that the holders of this office:

(i) have the qualifications to be nominated as a Supreme Court judge;

(ii) be appointed by the Governor in Council after consultation with the officers of the Nova Scotia Barristers' Society and with the Chief Judges of all courts in Nova Scotia for a term of seven years, with eligibility for re-appointment;

(iii) be removable for cause by the Governor in Council only after a resolution from the provincial legislature approving such action;

(iv) be paid and given employment benefits equivalent to those of judges of the Supreme Court of Nova Scotia, and have the status of a departmental "deputy-head".

(b) That the duties and responsibilities of the Director of Public Prosecutions include:

(i) the exercise of all of the functions of the Attorney General as agent and deputy of the Attorney General in relation to the administration of criminal justice in the province, subject to paragraph (d) below, and in particular,

(ii) regular consultation with the Attorney General concerning all aspects of public prosecution and the administration of the prosecution service;

(iii) the direction of the prosecution service of the province, including supervision of those functions presently exercised by the Director (Prosecutions) and the Director (Criminal);

(iv) the presentation of an annual report to the Attorney General on the conduct of public prosecutions in the province, which shall describe, among other matters, any personal interventions by the Attorney General pursuant to paragraph (d).

(c) That the duties and responsibilities of the local Prosecuting Officers continue to be the exercise of the powers of the Attorney General as agents of the Attorney General in the prosecution of offences subject only to the requirements of the law and to any guidelines or instructions provided by the Attorney General or the Director of Public Prosecutions;

(d) That the Attorney General continue to exercise the duties and responsibilities traditionally accorded to that office in relation to the administration of criminal justice, subject only to the limitations which follow:

(i) where he or she deems it necessary, the Attorney General may intervene in a prosecution contrary to the advice of the Director of Public Prosecutions but only through the use of written instructions which shall be published within 60 days of their issuance in the Royal Gazette*;*

(ii) the Attorney General shall, after consultation with the Director of Public Prosecutions, issue guidelines for the exercise of prosecutorial discretion which shall be tabled in the provincial legislature as soon as is practicable after their issuance; and

(iii) the Attorney General shall table in the provincial legislature so soon as is practicable the annual report received from the Director of Public Prosecutions pursuant to paragraph (b)(iv).

(e) That the Attorney General shall be assisted in the development of policy by the Director (Criminal Justice Policy Development) who shall consult with the D.P.P. but report through the Deputy Attorney General.

2.7 Racial Discrimination and Prosecutors

Racial discrimination in the Nova Scotia criminal justice system has been an important area of concern throughout the proceedings and activities of this Royal Commission. Two special studies have been undertaken at the behest of this Royal Commission which are particularly directed toward the problems encountered by Nova Scotian Micmacs [214] and Black Nova Scotians [215] in their dealings with representatives of the criminal justice system. The conceptual starting point for these studies is the idea that in order to demonstrate the existence of discrimination in the system, one need not prove that visible minorities are being *intentionally* treated in a manner less favourable than the dominant White majority. All one need demonstrate is systemic discrimination or "adverse effects" discrimination. In accordance with such an approach, discrimination has been defined as "... a specific act, policy or structural factor - intended or unintended - that results in adverse effects for members of certain specified groups".[216]

In accordance with this definition of systemic or adverse effects discrimination, the studies have concluded that there is racial discrimination against Blacks and Micmacs in Nova Scotia's criminal justice system. Over-representation of these groups, in comparison with their percentage in the population, among those arrested, charged, convicted and sentenced to imprisonment is evidence of systemic discrimination. Both studies recognize that the root causes for much of this discrimination lie in social, economic and political structures, institutions and values which are external to the criminal justice system. However, to the extent that the criminal justice system reflects these broader racist patterns in Nova Scotian society, those involved in the administration of criminal justice must bear some responsibility for rectifying this situation.

It is not being suggested here that large numbers of Nova Scotian prosecutors, judges or police officers are intentionally racist in their

214. Scott Clark, "The Mi'kmaq and Criminal Justice in Nova Scotia", Research Report for the Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax, 1988.

215. Wilson Head and Don Clairmont, "Discrimination Against Blacks in Nova Scotia and the Criminal Justice System", Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax, 1988.

216. Scott Clark, *supra*, footnote 213, at p. 20.

behaviour toward visible minorities, although this may sometimes be the case. In any event, instances of such crude racism, to the extent that they exist, are difficult to prove. But it is the unconscious systemic racism which is most difficult to eradicate, since it often proceeds under the mask of formally equal treatment. As the oft-quoted (and misquoted) adage of Anatole France states: "The law in its infinite wisdom and majesty punishes equally both the rich man and the poor man found sleeping under a bridge."

While this study on Prosecuting Officers was not intended to explore in depth issues of racism as they relate to the exercise of prosecutorial discretion, two questions in both the Crown and Defence Surveys were directed to this subject. Both Crowns and defence counsel were asked: "How would you describe the treatment presently accorded Black people in the criminal justice system as opposed to Whites?" Among the prosecutors, 85 percent said they thought the treatment was "equal", 7.5 percent said "better" and 7.5 percent said "worse".[217] Among those who volunteered comments, many said such things as "all are equal before the law", "no reason to believe otherwise", and "I have seen no evidence of discrimination". One stated emphatically:

"They are treated as equals. Trial decisions are based on the evidence. Sentence is based on the law, the offence and the offender."

On the other hand, defence counsel presented a less rosy picture concerning discrimination against Blacks. Only 58 percent of defence counsel thought Blacks were accorded equal treatment by the criminal justice system, while 38 percent said it was "worse" and only 4.2 percent said "better".[218] In those few cases where Crown counsel saw better treatment, volunteered comments indicated a perception in these instances that "reverse discrimination" resulted in Black convicted persons receiving lesser sentences than Whites would have received in similar circumstances.

These differences in perception between Crown and defence counsel about Blacks were replicated almost exactly in relation to the question concerning Native peoples. The question was worded: "How would you describe the treatment presently accorded Native peoples by the criminal justice system as opposed to Whites?" with the same three options being presented - "equal", "better" and "worse". Eighty-three percent of the Crowns thought Natives were treated equally by the criminal justice system, while 12 percent said "better" and only five percent said "worse". By contrast, only 51 percent of the defence counsel who responded thought that Native people receive equal treatment, nine percent thought they were

217. Crown Survey Results, Question 58.

218. Defence Survey Results, Question 22(a).

treated better, and 38 percent said "worse". The volunteered comments were of much the same tone as those made in relation to discrimination against Blacks, although some Crowns reported "no contact" with Native populations which was not the case in relation to Black Nova Scotians as accused persons.

Great caution must be exercised in drawing inferences from the responses to these questions. No definitions were given for "equal", "better" or "worse", and there was no explanation given as to distinctions between intentional racism and unintentional systemic discrimination. However, to the extent that large numbers of Crown prosecutors think that both Native peoples and Blacks are treated equally to Whites by the criminal justice system, it may indicate a lack of awareness on the part of these respondents of the systemic or adverse effects discrimination which characterizes the system. While such respondents may have the best of intentions with respect to treatment of visible minorities to the extent that they are not conscious of the way in which systemic discrimination operates, they are part of the problem.

Improvements to the criminal justice system cannot be expected to eradicate single-handedly the harmful effects of discrimination upon Nova Scotian Blacks and Native peoples. Nevertheless, certain recommendations for change in relation to the exercise of prosecutorial discretion and concerning the continuing professional training of prosecutors could significantly improve the lot of members of the province's visible minorities who come in contact with the justice system. In the following discussion certain proposals for change will be made which are couched in very general language at the level of principle. It must be born in mind, however, that Black communities and Black citizens of Nova Scotia find themselves in social, economic and cultural circumstances which are very distinct from the Native communities, and vice versa. Any attempt to implement solutions as if there is a monolithic "race problem" would itself be the product of unintended racism. Concrete solutions must be worked out in consultation with representatives of the various communities, having a careful regard for the particular characteristics of various Black and Native communities in different parts of the province.

The exercise of prosecutorial discretion does not occur within a social vacuum. The invocation of the public interest factors discussed earlier, which might justify diverting a potential accused person from the criminal justice system into a program for social support or victim/offender reconciliation, will only occur if such programs exist. A Crown prosecutor can put forward a regime of community service or rehabilitative training as a sentencing option only if such opportunities are available. To the extent that such diversion or

sentencing options are available in Nova Scotia at large, it may be that Native and Black Nova Scotians are not viewed, for reasons related to systemic racism, as good candidates for such programs. To the extent that such opportunities are not available, or have not been established with particular reference to the needs of the Black and Native communities, these circumstances are likely to reinforce systemic discrimination within the justice system. Within the ambit of the exercise of normal prosecutorial discretion, visible minorities may be penalized by an apparently "even-handed" approach. Thus, tailoring "equally available" diversion and sentencing options to the specific needs of particular target groups within the Nova Scotian population should have the potential for improving the situation of visible minorities.

Consistent with the "public interest factor" recommendations made earlier, however, there may be a need for special diversion or sentencing options developed in relation to Black or Native Nova Scotians. The details of such programs must be developed in consultation with the communities involved, but they could be designed to counter the effects of the social and economic circumstances which give these visible minorities disproportionate representation as accused, convicted and imprisoned persons in our criminal justice system. Since such programs could be viewed as unequal or preferential treatment of the persons involved, they would have to be carefully designed as having as their object "... the amelioration of conditions of disadvantaged individuals or groups ..." in accordance with the affirmative action provisions of Charter Section 15(2).

Whether improvements to the problems faced by visible minorities are conceived of as the application of universal programs in a manner which prevents visible minorities from being further disadvantaged, or as the creation of special programs designed to improve upon their disadvantaged circumstances, Crown prosecutors will have to be involved in the practical, day to day implementation of these programs. If the vast majority of Crowns do not recognize that the present system is characterized by systemic or adverse effects discrimination, they are unlikely to be enthusiastic participants in policies which will require a more creative exercise of prosecutorial discretion when dealing with accused members of designated visible minorities. It is therefore essential that continuing professional education programs for Crown prosecutors include sessions which will introduce Crown prosecutors to the facts of systemic discrimination in Nova Scotia's criminal justice system, and which will solicit their views on and participation in programs designed to ameliorate the situation.

The recommendations which follow are intended to provide a starting point for a contribution by the criminal justice system to the elimination of discrimination against visible minorities in Nova Scotia. It must be emphasized once again that these recommendations can only be implemented by consultation with the communities involved in a recognition of the particular circumstances of the various social, economic and cultural divergences in question. In particular, it might be noted that these recommendations are made without regard to (and without prejudice to) any arguments which might be made by Native communities that they are entitled by treaty rights to the creation of a separate and independent criminal justice system in relation to their peoples. This study has simply not addressed those complex issues.

Recommendation 23

That the Attorney General and Solicitor General cooperate in the development of diversion and sentencing options, in consultation with representatives of the Black and Native communities of Nova Scotia, with a view to:

(a) Ensuring that in assessing the applicability of universally available criminal justice programs, Native and Black Nova Scotians are not subjected to systemic discrimination by virtue of adverse social, economic and/or cultural circumstances; and

(b) Creating programs and activities which will have as their object the amelioration of the conditions of such disadvantaged individuals and groups to the extent possible within the criminal justice system.

Recommendation 24

That the Attorney General establish continuing professional education programs for Crown prosecutors which will include :

(a) An exposure to materials explaining the nature of systemic discrimination in the Nova Scotian criminal justice system toward Black and Native peoples; and

(b) An exploration of means by which Crown prosecutors can carry out their functions so as to reduce the effects of systemic discrimination in the Nova Scotian criminal justice system.

Part 3
Summary of Recommendations

1
Published Prosecutorial Guidelines

That the volume entitled *Advice to Prosecuting Officers*:

(a) be revised and updated in consultation with the Crown prosecutors so as to constitute a complete statement of the general instructions governing the prosecution of *Criminal Code* and other statutory offences in the province;

(b) be drafted in such a way as to clarify the extent to which prosecuting officers are "bound" by the precepts therein contained;

(c) be published and made available to the general public through the Nova Scotia Government Bookstore; and

(d) be sent to all Prosecuting Officers, including per diem Prosecuting Officers.

2
A Director (Criminal Justice Policy Development)

(a) That there be created within the Attorney General's Department a senior management position entitled Director (Criminal Justice Policy Development); and

(b) That the responsibilities of the Director (Criminal Justice Policy Development) include:

(i) The revision and publication of the *Advice to Prosecuting Officers*;

(ii) The development of general policies to cope with problems in the exercise of prosecutorial discretion and the administration of criminal justice; and

(iii) The development of law reform proposals, including responses to law reform efforts originating with other levels of government or from the general public.

3 A Regional Administrative Structure	**(a)** That the incipient system of regional administration of Prosecuting Officers be recognized in the statutory allocation of responsibilities among prosecutors; and **(b)** That a system of Chief Prosecuting Officers for each region be adopted in order to create an effective middle level of management in Nova Scotia's prosecution service.
4 A Specialized Prosecutions Unit	**(a)** That careful consideration be given to the creation of a specialized prosecution unit composed of senior and experienced counsel who would be assigned to the prosecution of complex cases, the prosecution of which might cause problems if handled by regular administrative units; **(b)** That leadership in such a specialized prosecution unit come from senior and experienced prosecutors chosen on the basis of merit; and **(c)** That the unit be used for training junior members of the prosecution service on a rotational basis.
5 Review of Prosecutors' Salaries	That the Attorney General's Department conduct a review of its salary levels in order to ensure that high calibre, dedicated personnel may be attracted to and retained as members of the province's prosecution service.
6 Administrative Support for Prosecutors	That the Attorney General's Department budget in the areas of improvement to physical facilities and support staff be reviewed and increased where necessary to provide adequate physical facilities and support staff according to more uniform standards across the whole prosecution service.
7 Research Facilities for Prosecutors	**(a)** That the Attorney General's Department take immediate steps to upgrade the research facilities of local Crown offices to ensure that basic texts, case reports and digests relevant to the prosecution of offences are available; **(b)** That training in use of recent research tools be a part of a regular process of continuing professional education for Crown prosecutors; and

(c) That the Attorney General's Department investigate the establishment of a computerized research facility for the Nova Scotia prosecution service, possibly in connection with the Nova Scotia Legal Aid Commission.

8
Evaluation Systems, Continuing Education and Promotion

(a) That the Attorney General's Department establish a working group to develop a computerized system of data collection in relation to the criminal justice system in the province so as to create the capacity to monitor and evaluate the performance, cost and efficiency, not only of the prosecution service, but also of other key aspects of the justice system;

(b) That the Attorney General's Department establish a coherent program of continuing professional education, in consultation with rank and file members of the prosecution service, through which to familiarize personnel on an organized basis with new developments in the law and evolving professional standards of competence and ethical responsibility; and

(c) That in the course of implementing the structural changes in the administration of the prosecution service contemplated in recommendations 2, 3, 4, 7(c) and 22, there be established a rational system of promotion based on merit through a career path which will satisfy a good prosecutor's need for recognized professional advancement.

9
The Police Duty to Investigate

(a) That in the investigation of offences prior to the laying of charges, it is understood that police officers are to carry out their legal duties in accordance with general standards, practices and policies established by the Solicitor General, but in consultation with the appropriate agent of the Attorney General where any particular investigation would be thought to benefit thereby; and

(b) That after the laying of charges, police shall carry out any investigations in accordance with the instructions of the Attorney General or appropriate prosecutor with a view to preparation of the case for presentation in court.

10
The Police Right to Charge and Attorney General's Discretion to Terminate Prosecutions

(a) That police officers be informed in general instructions from the Solicitor General that they have the ultimate right and duty to determine the form and content of charges to be laid in any particular case according to their best judgment, subject to the Crown's right to withdraw or stay the charges after they have been laid;

(b) That prosecutors be informed in general instructions from the Attorney General that police officers have the right and the duty to determine the form and content of charges to be laid in any particular case, subject to the Crown's right to withdraw or stay the charges after they have been laid;

(c) That police officers and Crown prosecutors be informed by their respective departmental superiors that police are encouraged to consult with the appropriate prosecutor concerning the drafting of informations, where such consultation might be thought useful; and

(d) That the Attorney General institute a system of post-charge screening in appropriate locations in the province (initially on a pilot project basis) to ensure that no charges which are not strictly necessary in accordance with the evidence and the public interest shall go forward.

11
Termination of Proceedings in the Public Interest

(a) That the Attorney General promulgate a clearly stated policy concerning the public interest factors which should, and should not, be considered in deciding whether to undertake or stop a prosecution even in the face of evidence which could sustain a conviction;

(b) That the factors which might arise for consideration in determining whether the public interest requires a prosecution, include:

(i) the triviality of the alleged offence or that it is of a "technical" nature only;

(ii) the youth, age, physical health, mental health or special infirmity of an alleged offender or witness;

(iii) the staleness of the alleged offence;

(iv) the degree of culpability of the alleged offender (particularly in relation to other alleged parties to the offence);

(v) the likely effect of a prosecution on public order and morale;

(vi) the obsolescence or obscurity of the law;

(vii) whether the prosecution would be perceived as counter-productive (such as by making a "martyr" of an alleged offender or by providing publicity to an alleged hate propagandist);

(viii) the availability or efficacy of any alternatives to prosecution in the light of the purposes of the criminal sanction;

(ix) the prevalence of the alleged offence and any related need for deterrence;

(x) whether the consequences of any resulting conviction would be unduly harsh or oppressive;

(xi) any entitlement of the State or other person to compensation, reparation or forfeiture if prosecution action is successful;

(xii) the attitude of the victim of the alleged offence to a prosecution;

(xiii) the likely length and expense of a trial;

(xiv) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which he or she has already done so;

(xv) the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;

(xvii) the necessity for the maintenance of public confidence in legislatures, courts and the administration of justice.

(c) That the factors which are to be excluded from consideration in determining whether the public interest requires a prosecution, include:

(i) the alleged offender's race, religion, sex, national origin, political associations, or beliefs - except in so far as these may relate to any program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups and which may be relevant to the public interest in the prosecution or its outcome;

(ii) the prosecutor's personal feelings concerning the victim or the alleged offender;

(iii) any partisan political advantage or disadvantage which might flow from the decision to undertake or stop a prosecution; or

(iv) the possible effect on the personal or professional circumstances of those responsible for the prosecution decision.

(d) That, where a prosecutor decides not to undertake or to stop a prosecution by reason of a public interest factor such as those mentioned in (b), a notation of this decision be placed in the file relating to the case in question.

(e) That the Solicitor General bring the foregoing public interest factors relevant to the prosecution of offences to the attention of police forces operating within the province.

12
Disclosure by Prosecutors

(a) That the Royal Commission endorse the new "Disclosure Guidelines" announced by the Attorney General on July 18, 1988 with the following exceptions:

(i) the disclosure guidelines should state that they are to be made available to counsel or accused persons upon request, (and be made available to the general public in accordance with recommendation 1);

(ii) the disclosure guidelines, when referring to appropriate matters for discretionary disclosure, should include the statement: "Additional disclosure shall normally include names and addresses of any potential witnesses, unless there are grounds to believe that there is a need to protect such witnesses from intimidation or harassment"; and

(iii) the obligation of continuing disclosure should be drafted to require provision of "new information relating to the case which the prosecutors believe may be relevant evidence or of assistance to the defence".

(b) That the Attorney General support the enactment of statutory duties of disclosure as proposed by the Law Reform Commission of Canada in their Report to Parliament, # 22 both in the *Criminal Code*, and in relation to provincial statutory offences.

13
Police Duties Regarding Disclosure

(a) That the Solicitor General inform police forces operating within the province of the Attorney General's guidelines on disclosure and require compliance with their principle in relations between police and prosecutors;

(b) That the Solicitor General ensure that continuing police training include information on the necessity of the disclosure policy to the sound administration of criminal justice within the province; and

(c) That the Solicitor General take steps to ensure that police departments operating within the province establish appropriate information storage and retrieval systems in relation to cases under investigation so as to ensure, among other things, the effectiveness of the Crown disclosure policy.

14
Statutory Regulation of Plea Discussions

That the Attorney General of Nova Scotia should support efforts to ensure that the process of plea discussion and plea agreement be made the subject of statutory regulation and control in the *Criminal Code*, in order to attain enforceability of outcomes in an open, voluntary, accurate and fair manner.

15
Guidelines for Plea Discussions and Plea Agreements

That the following guidelines, as a minimum, be issued to Crown prosecutors as the basis for the exercise of their prosecutorial discretion in relation to plea discussions and plea agreements:

(a) In the interpretation of these guidelines, the following definitions are applicable:

(i)"plea agreement" means any agreement by the accused to plead guilty in return for the promise of some benefit;

(ii) "plea discussion" means a discussion directed toward the conclusion of a plea agreement.

(b) Plea discussions may be undertaken by prosecutors under the conditions set out in these guidelines, in order to establish plea agreements in the manner required by these guidelines.

(c) A prosecutor shall not in plea discussions, suggest, conclude or participate in any plea agreement that:

(i) requires the accused to plead guilty to an offence not disclosed by the evidence; or

(ii) requires the accused to plead guilty to charges that inadequately reflect the gravity of the accused's proveable conduct, unless such a plea is based on one of the public interest factors identified in recommendation 11, or is otherwise justifiable in the administration of justice or the protection of society.

(d) A prosecutor shall not involve any judicial officer in plea discussions or plea agreements, except that the prosecutor and an accused who have concluded a plea agreement shall, before the plea is entered, disclose to the court:

(i) the nature of and reasons for the agreement; and

(ii) whether any previous plea agreement has been disclosed to another judge in connection to the same matter and, if so, the nature of the agreement.

(e) The disclosure and reasons given in paragraph (d) shall be made in open court, unless compelling reasons such as the likelihood of serious harm to an accused or another person, require otherwise.

(f) A prosecutor shall not, when there is an alternative, have plea discussions with an accused in the absence of the accused's counsel.

(g) A prosecutor with whom an unrepresented accused wishes to have plea discussions shall inform the accused that:

(i) representation by counsel may be advantageous to the accused; and

(ii) if the accused cannot afford to retain counsel, he or she may be able to obtain assistance from an appropriate legal aid service.

(h) A prosecutor shall be careful to ensure that accused persons in similar circumstances receive equal treatment in respect of plea discussions and plea agreements.

(i) In complying with the guidelines on plea discussion and plea agreements, a prosecutor shall have regard to whether there has been compliance with the guidelines based on recommendation 13 concerning disclosure of the Crown's case to the accused.

(j) During plea discussions, the prosecutor shall:

(i) never suggest the laying of charges not believed to be supported by proveable facts;

(ii) never suggest the laying of any charge not usually laid in relation to the accused's alleged conduct unless in accordance with the public interest factors of recommendation 11;

(iii) never suggest that a plea of not guilty will lead the prosecutor to seek a heavier penalty than that normally obtained in such circumstances;

(iv) never make any material misrepresentation;

(v) never attempt to persuade the accused to plead guilty in the face of continued denials of guilt; and

(vi) never make any offer or promise unrelated to the prosecutor's proper function.

16
Pre-Trial Conferences

That the Attorney General and the Chief Judges of the appropriate courts consider the feasibility of a system whereby a pre-trial conference might be conducted, in appropriate circumstances, by a judge other than the judge who will preside over the trial.

17
Summaries to Trial Judges

That guidelines to prosecutors concerning "Summaries to Trial Judges" require disclosure of summaries to defence counsel in time to allow for amendment, prior to their submission to the trial judge where possible, and in any event, to allow defence counsel time to respond in an appropriate manner prior to the pre-trial conference or the commencement of the trial.

18
Preliminary Transcripts in Non-Jury Trials

(a) That the Attorney General seek amendments to *Criminal Code* Section 551 to the effect that the clerk or proper officer of the trial court is required to retain the transcript of the preliminary inquiry for distribution to the parties and for the purposes of the hearing, but that trial court judges sitting without juries are not to be given pre-trial access to the preliminary transcript.

(b) That the Chief Judge of the County Court and the Chief Justice of the Supreme Court (Trial Division) bring to the attention of their colleagues the dangers of potential prejudice to accused persons posed by the reading of transcripts of preliminary inquiries in non-jury trials.

19
The Impartiality of the Judiciary and Proper Conduct

(a) That guidelines be drafted by the Attorney General in the following terms:

(i) A prosecutor's duties necessarily involve frequent and regular official contacts with the judge or judges of the prosecutor's jurisdiction. In such contacts the prosecutor must carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions and the Code of Professional Conduct require of counsel and judges.

(ii) A prosecutor must not initiate out of court contact with a judge during the course of a proceeding in the absence of defence counsel, and must decline such contact if initiated by a judge.

(iii) In the event that a prosecutor observes conduct on the part of a judge which the prosecutor believes to be improper, or unethical, such incidents should be reported to the Director (Prosecutions) for possible referral to the Judicial Council.

(b) That the Chief Judges of the Provincial Court, County Court and Supreme Court bring to the attention of their respective colleagues the dangers of conduct, which is, or might be perceived to be, improper contact with prosecutors, police, defence counsel or other participants in the criminal justice system.

20
The Unrepresented or Under-represented Accused

That the Attorney General's Guidelines to Prosecuting Officers include an explicit statement concerning proper conduct of trials involving accused persons who are unrepresented by counsel or whose counsel is not providing what the prosecutor considers to be adequate representation in the circumstances.

21
Non-Partisan Hiring Practices

That in order to maintain public confidence in the political impartiality of the hiring, firing and treatment of prosecutors:

(a) The *Prosecuting Officers Act* be amended to make reference to Civil Service Commission standards and procedures in the appointment and termination of appointment of Prosecuting Officers and Assistant Prosecuting Officers; and

(b) Administrative procedures be put in place by the Department of Attorney General in conjunction with the Civil Service Commission by which any partisan political bias, or appearance thereof, in the employment of prosecutors may be avoided.

22
The Director of Public Prosecutions

(a) That there be created by an Act of the provincial legislature the office of Director of Public Prosecutions, and that the holders of this office:

(i) have the qualifications to be nominated as a Supreme Court judge;

(ii) be appointed by the Governor in Council after consultation with the officers of the Nova Scotia Barristers' Society and with the Chief Judges of all courts in Nova Scotia for a term of seven years, with eligibility for re-appointment;

(iii) be removeable for cause by the Governor in Council only after a resolution from the provincial legislature approving such action;

(iv) be paid and given employment benefits equivalent to those of judges of the Supreme Court of Nova Scotia, and have the status of a departmental "deputy-head".

(b) That the duties and responsibilities of the Director of Public Prosecutions include:

(i) the exercise of all of the functions of the Attorney General as agent and deputy of the Attorney General in relation to the administration of criminal justice in the province, subject to paragraph (d) below; and in particular,

(ii) regular consultation with the Attorney General concerning all aspects of public prosecution and the administration of the prosecution service;

(iii) the direction of the prosecution service of the province, including supervision of those functions presently exercised by the Director (Prosecutions) and the Director (Criminal);

(iv) the presentation of an annual report to the Attorney General on the conduct of public prosecutions in the province, which shall

describe, among other matters, any personal interventions by the Attorney General pursuant to paragraph (d).

(c) That the duties and responsibilities of the local Prosecuting Officers continue to be the exercise of the powers of the Attorney General as agents of the Attorney General in the prosecution of offences subject only to the requirements of the law and to any guidelines or instructions provided by the Attorney General or the Director of Public Prosecutions;

(d) That the Attorney General continue to exercise the duties and responsibilities traditionally accorded to that office in relation to the administration of criminal justice, subject only to the limitations which follow:

(i) where he or she deems it necessary, the Attorney General may intervene in a prosecution contrary to the advice of the Director of Public Prosecutions but only through the use of written instructions which shall be published within 60 days of their issuance in the *Royal Gazette*;

(ii) the Attorney General shall, after consultation with the Director of Public Prosecutions, issue guidelines for the exercise of prosecutorial discretion which shall be tabled in the provincial legislature as soon as is practicable after their issuance; and

(iii) the Attorney General shall table in the provincial legislature so soon as is practicable the annual report received from the Director of Public Prosecutions pursuant to paragraph (b)(iv).

(e) That the Attorney General shall be assisted in the development of policy by the Director (Criminal Justice Policy Development) who shall consult with the D.P.P. but report through the Deputy Attorney General.

23
Prosecution Policy and Racism

That the Attorney General and Solicitor General cooperate in the development of diversion and sentencing options, in consultation with representatives of the Black and Native communities of Nova Scotia, with a view to:

(a) Ensuring that in assessing the applicability of universally available criminal justice programmes, Native and Black Nova Scotians are not subjected to systemic discrimination by virtue of adverse social, economic and/or cultural circumstances; and

(b) Creating programmes and activities which will have as their object the amelioration of the conditions of such disadvantaged individuals and groups to the extent possible within the criminal justice system.

24
Professional Education and Racism

That the Attorney General establish continuing professional education programmes for Crown prosecutors which will include:

(a) An exposure to materials explaining the nature of systemic discrimination in the Nova Scotian criminal justice system toward Black and Native peoples; and

(b) An exploration of means by which Crown prosecutors can carry out their functions so as to reduce the effects of systemic discrimination in the Nova Scotian criminal justice system.

Appendices

1
List of Participants Peer Review Workshop* on "Prosecuting Officers and the Administration of Justice in Nova Scotia"

June 23, 1988

* Each of the Commission's research studies was scrutinized in early draft form by experts in the field, and discussed in a workshop format with the Commissioners and Commission staff, the peer reviewers, and invited professional and community participants.

List of Participants

Chair:
Lois Dyer Mann, Vice-President (Administration), Mount St. Vincent University and former Executive Secretary of the Royal Commission

Researcher:
Professor Bruce Archibald, Associate Professor, Dalhousie Law School, Principal Researcher

Reviewers:
1. Ken Chasse, Director of Research, Ontario Legal Aid Plan, Toronto
2. Gordon Gregory, Q.C., former Deputy Attorney General, New Brunswick
3. Marc Rosenberg, Barrister, Greenspan, Rosenberg, Toronto

Royal Commission:
1. Chief Justice Hickman, Chairman
2. Associate Chief Justice Poitras, Commissioner
3. Honourable Gregory T. Evans, Q.C. Commissioner
4. George MacDonald, Q.C., Counsel
5. David Orsborn, Counsel
6. W. Wylie Spicer, Counsel
7. Susan Ashley, Commission Executive Secretary
8. John Briggs, Director of Research
9. Prof. John Edwards, Special Advisor to Commission
10. Dr. Philip Stenning, Research Consultant to Commission

Invited Participants:
1. James D. Bissell, Director, Atlantic Region, Department of Justice, Canada
2. Lorenne Clark, Defence Counsel, Digby, Nova Scotia.
3. Stanley Cohen, Coordinator, Criminal Procedure Project, Law Reform Commission of Canada
4. Professor Brent Cotter, Associate Dean, Faculty of Law, Dalhousie University
5. Anne Derrick, Counsel to Donald Marshall, Jr.
6. William Digby, Q.C., Lawyer, Nova Scotia Legal Aid
7. Pat Duncan, Lawyer, Halifax
8. Martin Herschorn, Director (Prosecutions), Department of Attorney General, Nova Scotia
9. Professor Archie Kaiser, Faculty of Law, Dalhousie University
10. William MacDonald, Q.C., Deputy Attorney General, Nova Scotia

11. Robert Parker, Crown Prosecutor, Nova Scotia
12. Darrel Pink, Counsel to Department of Attorney General
13. Adrian Reid, Crown Prosecutor, Nova Scotia
14. Anthony Ross, Counsel to Oscar Seale and the Black United Front
15. Jamie Saunders, Counsel to Department of Attorney General
16. Bruce H. Wildsmith, Counsel to Union of Nova Scotia Indians

2
Prosecuting Officers Act

R.S.N.S. 1954, c.226

1.

(1) At the criminal sittings of the Supreme Court at Halifax, or at the sittings of the Supreme Court in any county, or at any sittings of the county court judge's criminal court, the prosecution of criminals and other criminal business shall be taken charge of and conducted, on behalf of the Crown, by the following persons, that is to say:

(a) if the Attorney General is present at the sittings, by the Attorney General, or by a Queen's counsel or other competent barrister appointed by him at such sittings;

(b) if the Attorney General is not present, by a Queen's counsel or other competent barrister appointed by him in writing under his hand; and such appointment in writing shall be accepted by the presiding judge as a sufficient authority in that behalf;

(c) if the Attorney General is not present, and no Queen's counsel or barrister at the opening of the sittings presents a written appointment from the Attorney General, then by a Queen's counsel, or, in the absence of Queen's counsel, a competent barrister appointed by the presiding judge.

(2) The counsel appointed by the Attorney General to conduct criminal proceedings in any county in Nova Scotia shall be known and designated as the "prosecuting officer", and have all the powers and duties provided for such an officer by the criminal law of Canada. R.S., c. 220, s.1.

2.

(1) The presiding judge shall tax and allow to any such Queen's counsel, or other barrister so appointed, such reasonable fees for the services performed by him as are prescribed for civil actions by the *Costs and Fees Act;* but such fees, in any one case, shall not exceed:

(a) in the Supreme Court, the sum of thirty dollars; and

(b) in the county court judge's criminal court, the sum of twenty dollars.

(2) The amount of the bill so taxed shall be paid out of the Consolidated Revenue Fund, upon the production of a certificate, under the seal of the court, that such amount has been taxed and allowed. R.S., c. 220, s. 2.

3.

(1) Whenever it appears to the Attorney General that any criminal matter is of an exceptional character, requiring special attention in the public interest, he may, at any stage, appoint a barrister to appear and act for the Crown at any inquest held by a coroner, or by a stipendiary magistrate, or at any preliminary examination, or other investigation in respect to such matter.

(2) The fee for such barrister shall be ten dollars for each day, unless a larger fee is for good cause allowed by the Attorney General.

(3) Such fees shall be paid out of the Consolidated Revenue Fund, upon the certificate of the Attorney General. R.S., c. 220, s.3.

4.

(1) Notwithstanding anything in this Act, the Attorney General may appoint in any city, town or county, a competent barrister, who shall take charge of and conduct, on behalf of the Crown, the prosecution of criminals and other criminal business.

(2) The prosecuting officer so appointed shall receive such remuneration annually as may be fixed by the Governor in Council.

(3) Such remuneration shall be paid out of the Consolidated Revenue Fund, on the certificate of the Attorney General.

(4) The duties of such prosecuting officer shall from time to time be prescribed by the Attorney General.

(5) Such prosecuting officer may be removed at any time by the Governor in Council on a report from the Attorney General. R.S., c. 220, s.4.

3
Prosecuting Officers Act,

S.N.S. 1960, c.12

An Act to Revise Chapter 226 of the Revised Statues, 1954, the *Prosecuting Officers Act* (Assented to the 13th day of April, A.D., 1960)

Be it enacted by the Governor and Assembly as follows:

1.
This Act may be cited as the *Prosecuting Officers Act*.

2.
The Attorney General may take charge of and conduct on behalf of the Crown the prosecution of criminals and other criminal business at any sittings of the Supreme Court or of a county court judge's criminal court or before any magistrate or justice.

3.
If the Attorney General or a prosecuting officer appointed by him pursuant to this Act does not take charge of the prosecution of criminals and other criminal business at any sittings of the Supreme Court or of a county court judge's criminal court the presiding judge may appoint a competent barrister to take charge of and conduct on behalf of the Crown the prosecution of criminals and other criminal business at that sittings.

4.
The Attorney General shall appoint for each county a barrister to take charge of and conduct on behalf of the Crown the prosecution of criminals and other criminal business at the sittings of the Supreme Court or at any sittings of the county court judge's criminal court or before any magistrate, justice or coroner in the county.

5.
The barrister so appointed shall be known and designated as the prosecuting officer and, within the county for which he is appointed, has all the powers, authorities and duties provided by the criminal law of Canada for prosecutors, or for prosecuting officers, or for counsel for the Attorney General.

6.
(1) The Attorney General may appoint in each county one or more barristers to be assistant prosecuting officers for the county.
(2) An assistant prosecuting officer, acting in any matter or proceeding, has the same powers, authorities and duties as the prosecuting officer.

7.
(1) If there is a vacancy in the office of prosecuting officer, or if the prosecuting officer is for any reason unable or unwilling to act, or if for any reason the Attorney General considers it in the interest of the administration of justice to do so, the Attorney General may appoint a barrister to take charge of and conduct any particular prosecution or the prosecution at any sittings of any court or otherwise to take charge of and conduct criminal business to the extent specified in the terms of the appointment.
(2) A barrister appointed pursuant to this section shall be known and designated as a special prosecuting officer and, when acting within the terms of his appointment, has all the powers, authorities and duties of a prosecuting officer.
(3) The Attorney General may from time to time vary the terms of the appointment of a special prosecuting officer or may at any time revoke such appointment.

8.
(1) A prosecuting officer or an assistant prosecuting officer may be removed from office at any time by the Governor in Council on a report from the Attorney General.
(2) The appointment of a special prosecuting officer shall not terminate, revoke or rescind the appointment of a prosecuting officer or an assistant prosecuting officer.

9.
The Governor in Council may from time to time fix an annual remuneration for any prosecuting officer or assistant prosecuting officer.

10.
A prosecuting officer or an assistant prosecuting officer for whom an annual remuneration has not been fixed or a special prosecuting officer shall be paid such reasonable fees as may be taxed and approved by a solicitor on the staff of the Department of the Attorney General for his services in any matter or proceeding in which he acts.

11.
(1) The Attorney General may prescribe the duties of prosecuting officers or of a prosecuting officer and may from time to time issue instructions to prosecuting officers, which instructions it shall be the duty of the prosecuting officer to observe and follow.
(2) In this section the expression "prosecuting officer" includes assistant prosecuting officer.

12.
Chapter 226 of the Revised Statutes, 1954, the *Prosecuting Officers Act*, is repealed.

13.
This Act shall come into force on and not before the first day of July, 1960.

4
Memo from Deputy Attorney General to Staff

December 1, 1966

From:
Deputy Attorney General

To:
All Members of the Main Office Staff

This is an updating of professional staff assignments. It is again emphasized that no rigid division is intended and that all professional members of the staff will be expected to maintain familiarity with the general work of the Department, and will be expected to consult each other on all major questions. It is also to be understood that any member of staff who is under temporary pressure will seek, and should receive, the assistance of others. It is again pointed out that primary responsibility will be as set out hereunder, and incoming correspondence will be distributed in the first instance accordingly. The Attorney General will be advising the senior officers of the several Departments.

Mr. Jones
All matters relating to legislation, particularly proposed legislation, and including final approval of all regulations originating within the Government; all appeals in indictable offences.

Mr. Kavanagh
Matters relating to the Departments of Mines, Labour, Trade and Industry, Agriculture and Marketing, matters relating to the Water Authority, and proceedings under the *Quieting Titles Act*.

Mr. Anderson
All *Criminal Code* matters, including police reports and correspondence in relation to *Criminal Code* matters with Prosecuting Officers and others, but not including appeals in indictable offences or Provincial statute prosecutions; matters relating to the Departments of Municipal Affairs and Education, exclusive of summary conviction prosecutions under the *Education Act*.

Mr. Conrad
Matters relating to the Department of Health, including the Hospital Insurance Commission, the Hospital Tax Commission and the Medical Care Commission; the Department of Welfare, not including the Housing Commission; the Department of the Provincial Secretary, including Credit.

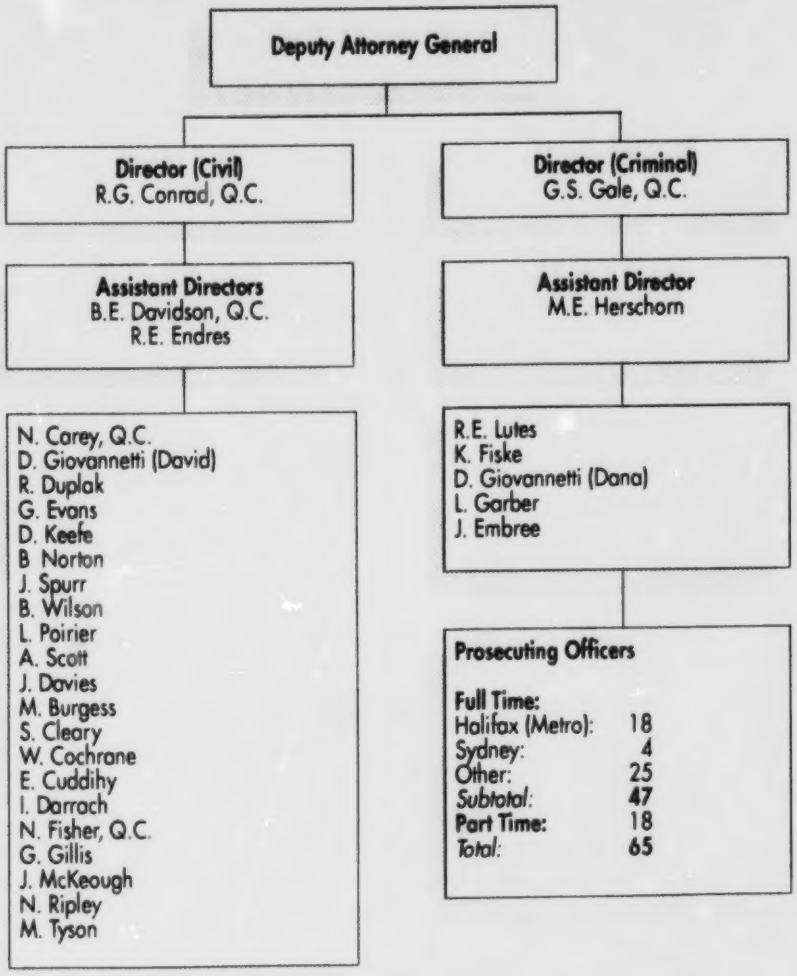
Mr. Gale
Matters relating to the Department of Highways, including the Motor Vehicle Branch; matters relating to the Liquor Commission and the Liquor Licensing Board, the supervision of legal matters relating to Maintenance Orders; the licensing of gun clubs; divorce; and all actions and prosecutions under Provincial statutes, including prosecutions under statutes administered by other Departments of Government.

Mr. Ronald MacDonald
All non-legal administrative matters, including requisitions for all branches, payrolls, personnel matters, accounts of solicitors conducting prosecutions; routine Maintenance Order cases; matters relating to the inspection of Public Offices; and matters relating to budget control.

Mr. Walker
Matters relating to the Department of Fisheries, Public Works, Land and Forests; matters relating to the Housing Commission, Estates and loans to Universities; matters relating to Nova Scotia's participation in the Centennial Pavilion at EXPO.

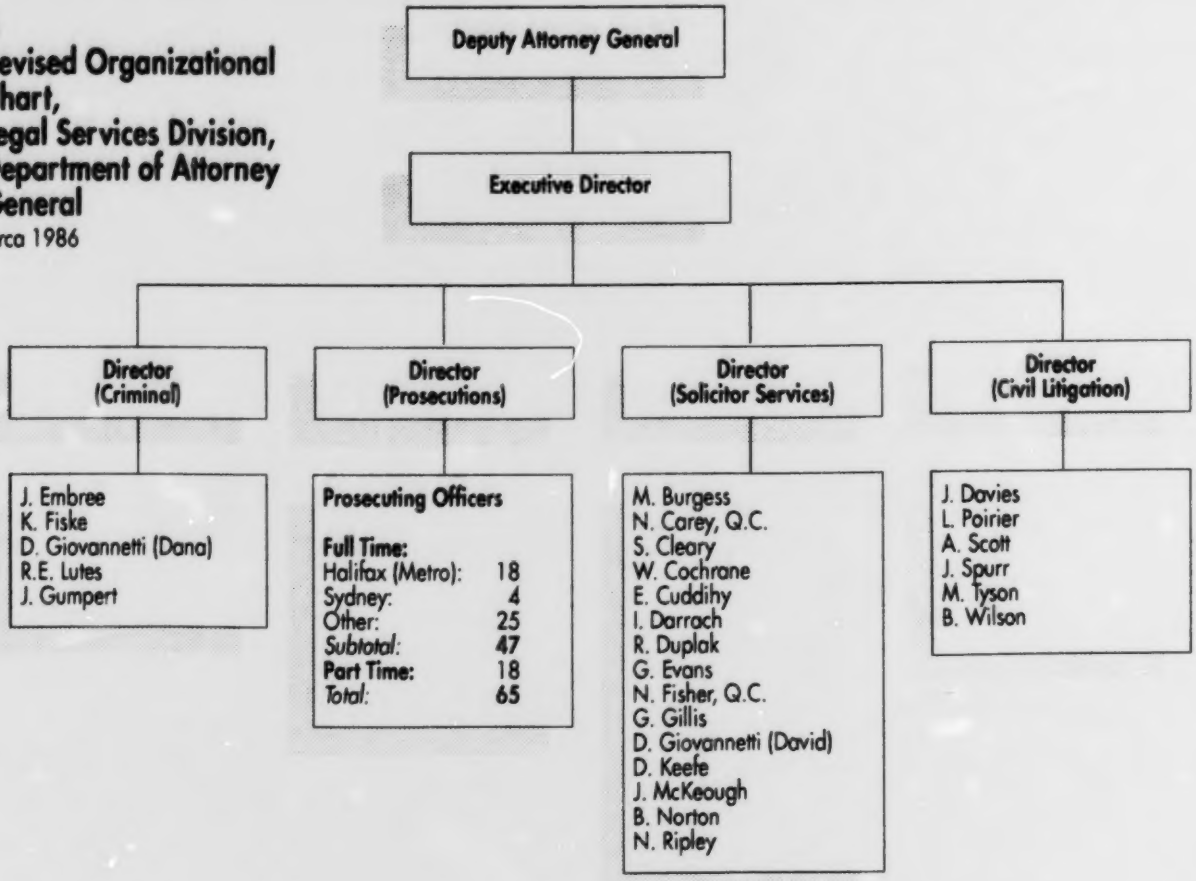
The Deputy
Matters relating to the Premier's Office, Department of Finance and Economics, all Federal Departments, Public Utilities, Civil Service Commission, Probation, Public Offices and, in the first instance, all miscellaneous matters or matters not coming within the classifications set out above.

5
Organizational Chart, Legal Services Division, Department of Attorney General
circa 1971

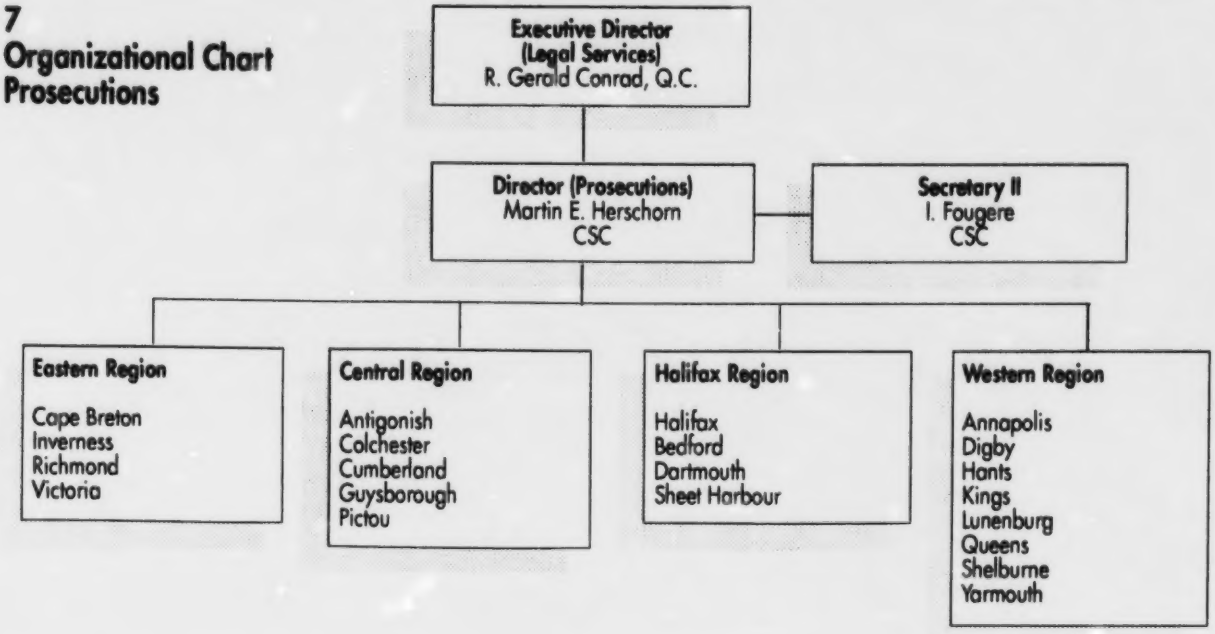


6
Revised Organizational Chart, Legal Services Division, Department of Attorney General

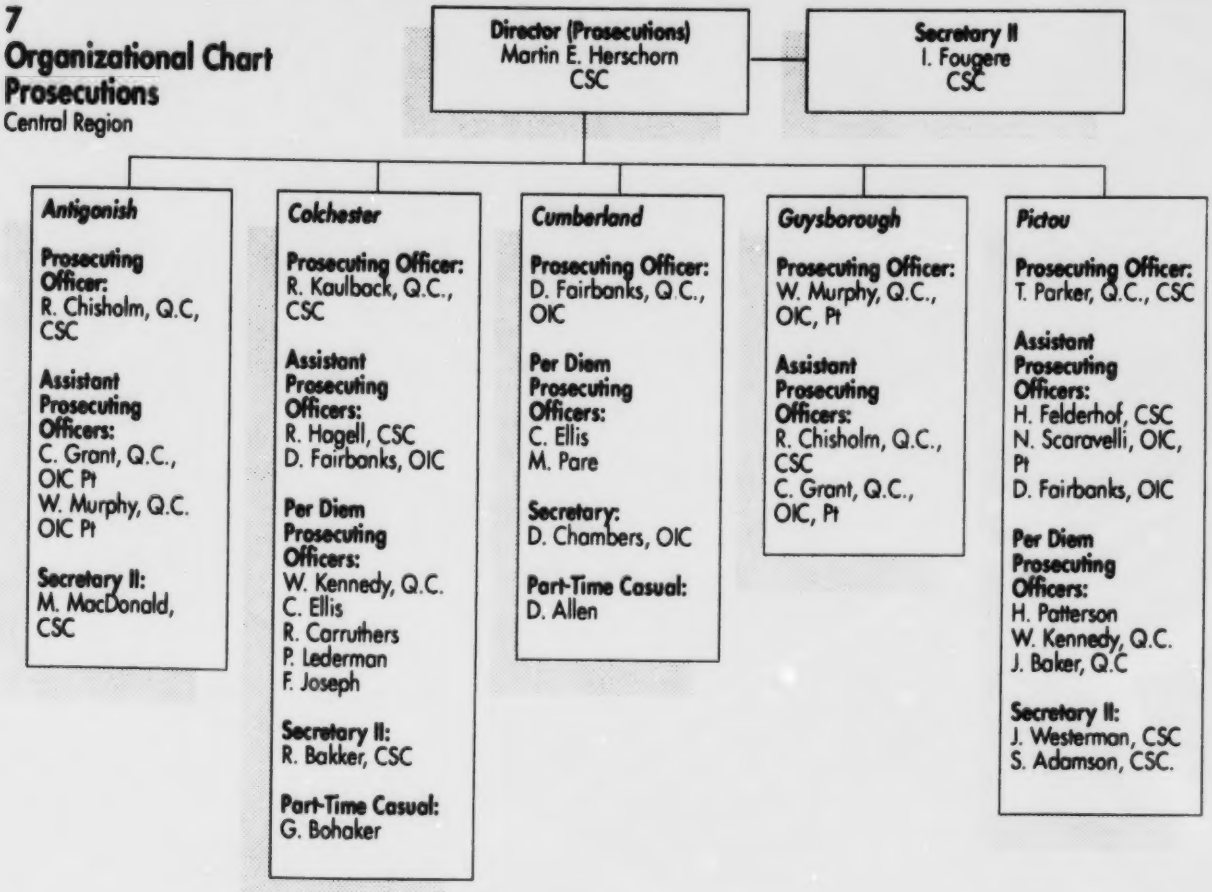
circa 1986



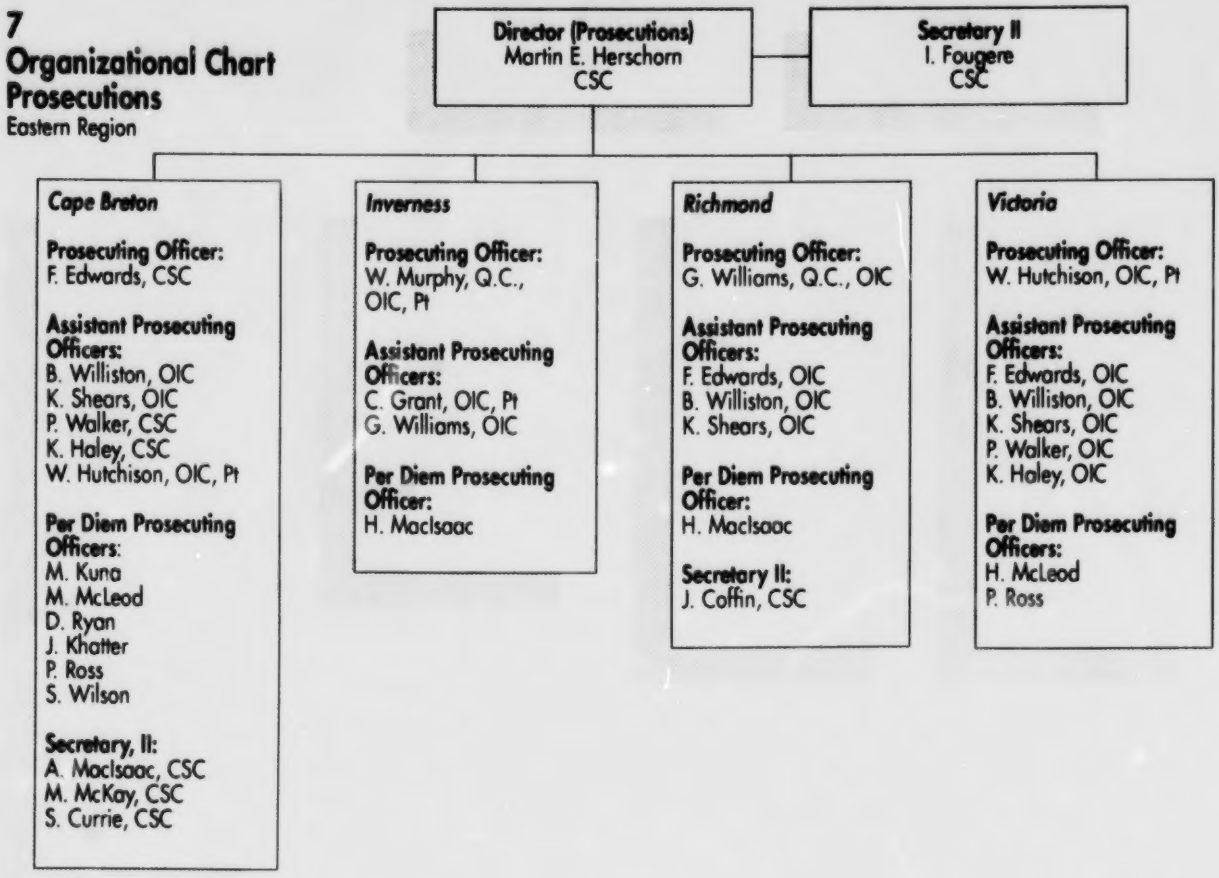
7
Organizational Chart
Prosecutions



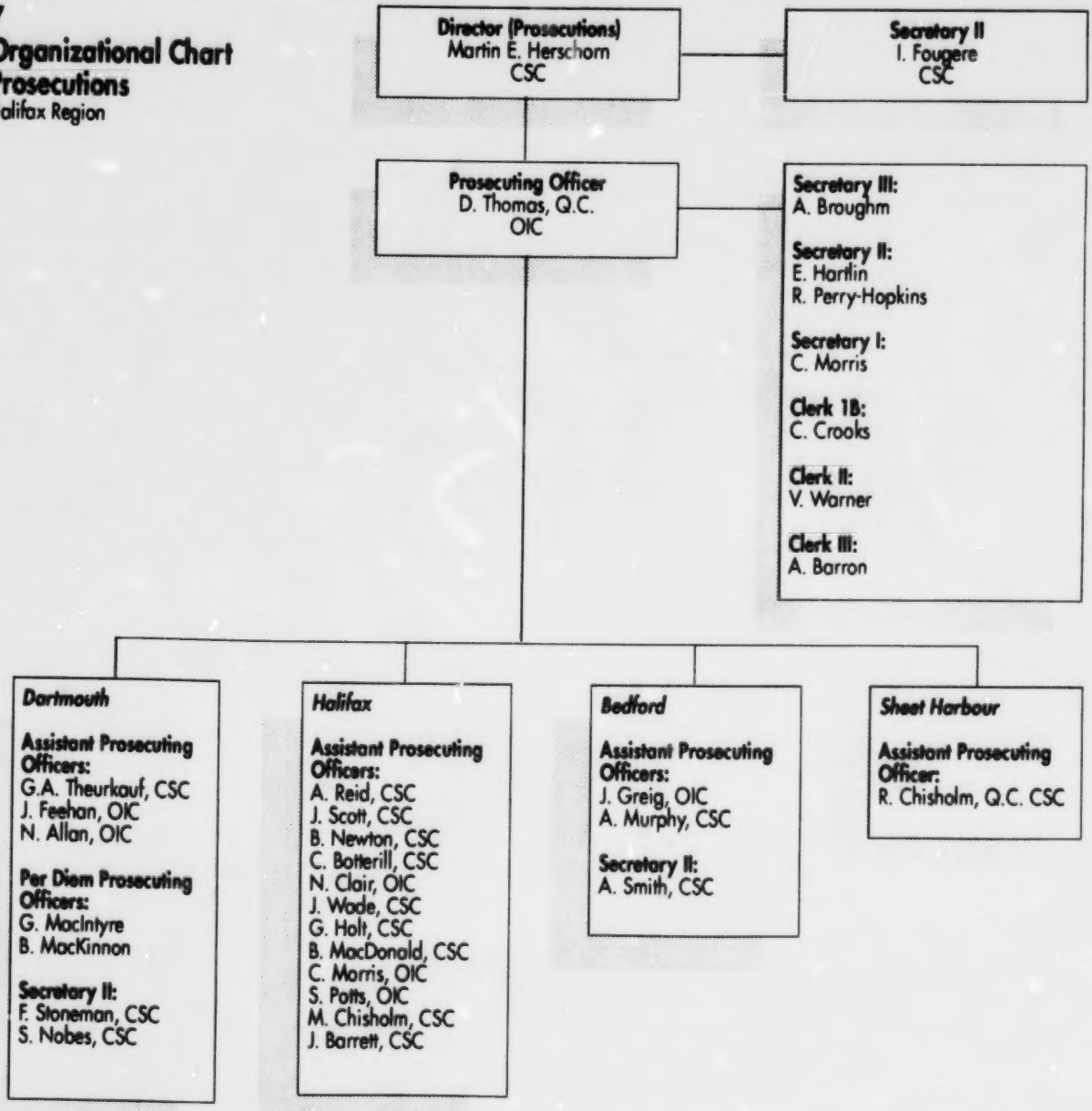
7
Organizational Chart
Prosecutions
Central Region



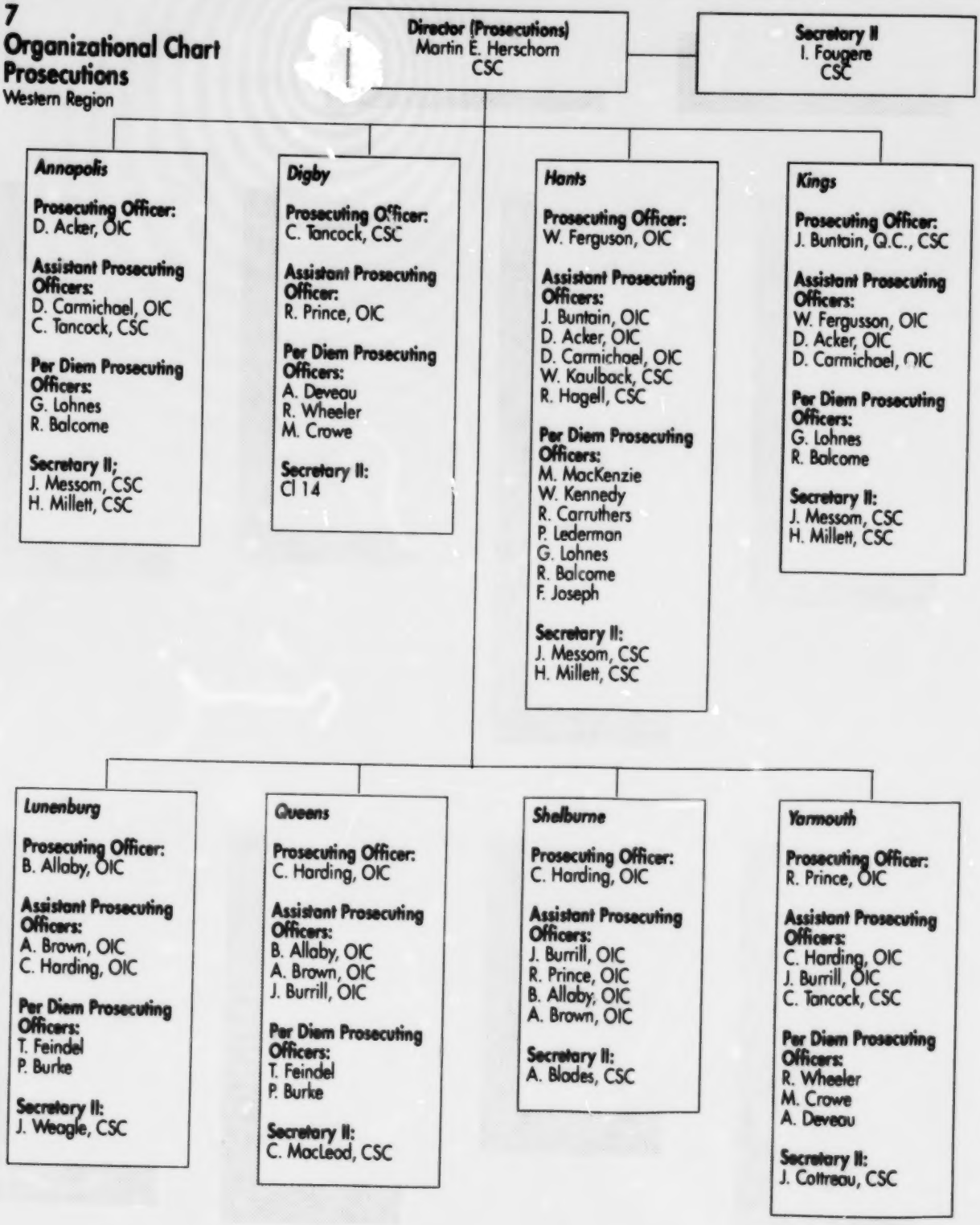
7
Organizational Chart
Prosecutions
Eastern Region



7
Organizational Chart
Prosecutions
Halifax Region



7
Organizational Chart
Prosecutions
Western Region



8
Order in Council Appointment of Assistant Prosecuting Officer

To:
Of:
In the County of:
And All Others Whom it May Concern

KNOW YE that under and by virtue of Chapter 240 of the Revised Statutes of Nova Scotia, 1967, the *Prosecuting Officers Act,* and of every other power and authority in me vested in that behalf, effective on and from the day of , 19 , I have appointed and do by these presents appoint the said , as Assistant Prosecuting Officer for the County of , to take charge of and conduct on behalf of the Crown the prosecution of criminals and other criminal business at all sittings of the Supreme Court in the County of , and at all sittings of the County Court Judge's Criminal Court in the County of , and before any provincial court judge or justice in the County of , the said to have for that purpose all powers, authorities and duties provided by the criminal law of Canada for prosecutors, or for prosecuting officers, or for counsel for the Attorney General.

GIVEN under my hand at the City of Halifax, Province of Nova Scotia, this day of , 19 .

Attorney General

9
Position Description, Assistant Prosecuting Officer

July 1980

Position: Assistant Crown Prosecutor (Prosecuting Officer IV)

Incumbent:

Department: Attorney General

Division: Halifax County Prosecuting Office

Location: Halifax

Date: July 2, 1980

General Accountability:
This position is accountable for representing the Crown in the prosecution of criminal matters and all provincial statutes for the Province of Nova Scotia in the Supreme Court, County Court and Provincial Magistrate's Court.

Structure:
This position is one of twelve reporting to the Crown Prosecutor for the County of Halifax. In the absence of the Prosecuting Officer, the eleven (11) Assistant Crown Prosecutors report to the one Prosecuting Officer V.

The other ten (10) Assistant Crown Prosecutors consist of Prosecuting Officers I, II, III.

There are no subordinates reporting to this position.

Nature and Scope:
The Attorney General of Nova Scotia is responsible for the administration of justice within the Province. Included in this responsibility is the taking charge of and conducting on behalf of the Crown the prosecution of criminals and other criminal matters. The Attorney General under the *Prosecuting Officers Act* appoints a barrister to represent the Crown in this respect for each County in the Province. This barrister is known as a Prosecuting Officer. The Attorney General may also appoint in each County any number of barristers to be Assistant Prosecuting Officers. They have the same power, authority and duties as the Prosecuting Officer, but are subject to his direction. All of the above must be practicing members of the Nova Scotia Barristers' Society.

A Prosecuting Officer IV is consulted on a daily basis by the police, members of various government departments and the public concerning the laying of charges, and in particular those of a more complex nature; for example, a complicated commercial fraud. Therefore, he must call upon his knowledge and experience in the criminal law - substantive, procedural and evidentiary. He must also keep abreast of the latest developments in the criminal law by the perusal of current legal publications and the maintenance of up-to-date reference files. On occasion he is required to attend continuing legal education courses.

After a charge is laid, the Crown must be represented by an Assistant Prosecuting Officer at the following stages of the criminal proceedings: arraignments, show cause hearings, preliminary inquiries, and trials. All of the above require advance preparation, and in particular preparation for a trial includes the following elements: he must select, summons, and interview the witnesses that he needs to prove the charge. He will then address himself to the law applicable to the charge and prepare for both the cross-examination of anticipated defence witnesses and his final argument to the Judge

or Jury. He then presents his case in the courtroom and if a finding of guilty is made, he must prepare for and represent the Crown at the sentencing of the accused person.

A Prosecuting Officer IV must handle all the summary conviction appeals to the County Court. This requires that he do extensive research into the legal issues that are the basis of the appeal. Frequently, he is required to prepare and submit written briefs to the Appellate Judge.

The criminal charges routinely prosecuted by a Prosecuting Officer IV are of a more serious and complex nature than those routinely prosecuted by a Prosecuting Officer I, II, III.

In addition, a Prosecuting Officer IV has daily contact with members of the public, concerning questions they have about the criminal law. He is also called upon to address various organizations that are interested in the criminal law, such as police organizations, High School classes, etc.

Finally, the Prosecuting Officer IV is in almost continuous contact with other members of the practicing Bar and the judiciary. He must be able to get along with these people and must maintain a reputation of the highest integrity, honour and impartiality in order to effectively represent the Crown.

The Incumbent provides advice to less experienced Assistant Crown Prosecutors concerning the laying of criminal charges and other related problems that arise on a frequent basis.

The major challenge of the position is decision making. As has already been mentioned, the *Prosecuting Officers Act* confers the power and authority to make decisions that will have a great impact on the lives of many people. He must make many decisions daily, such as whether criminal charges are to be laid and against whom, how the trial is to be conducted, whether magisterial inquiries are required following fatalities, etc.

The decision making responsibilities of the Prosecuting Officer IV are more onerous because he is consulted in an advisory capacity by less experienced staff.

In the day to day performance of his decision making duties, the Incumbent has a great deal of discretion which is subject to only very broad directives from the Prosecuting Officer or the Attorney

General's Department. Thus, he functions virtually independently in the decisions he makes. Only in the most unusual cases is he specifically directed to take certain action.

Some examples will serve to illustrate the importance of the decisions the Prosecutor is called upon to make. One is in the area of appeals. Unless the Prosecutor determines to recommend an appeal after the trial is completed, the matter is unlikely to come to the attention of anyone in the Department until the appeal period has expired. Thus, there is a heavy responsibility on the Prosecutor regarding the launching of appeals. Making decisions on which cases should be considered for appeal becomes one of the primary challenges of the job.

Another example involves submissions on sentencing. The Prosecutor is often inundated with psychiatric reports, Pre-sentence Reports and offers to plead guilty, if the Prosecutor will make certain concessions on sentencing submissions. The Prosecutor must decide how the best interests of justice can be served in light of these factors and then formulate his submissions accordingly without forgetting the victim of the crime.

Dimensions:
A Prosecuting Officer IV has no direct impact on budget or monetary considerations for the Prosecutor's Office for the County of Halifax.

This position has a great impact in human terms and in public relations as the decisions made by the Prosecutor directly affect these classes of people:

(1) *The Police* - who rely on free access to the Prosecutor in preparing their cases and handling legal problems related to the performance of their duties.

(2) *The Public* - who perceive the Prosecutor as their advocate in court - who access the Prosecutor's performance as representative of the Attorney General's Department as a whole.

(3) *The Accused* - whose ultimate fate is often largely determined by the manner in which the Prosecutor exercises his discretion in handling the case.

The importance of this position has been summed up by Mr. Justice Rand of the Supreme Court of Canada in *Boucher* v. *The Queen*, (1955) 20 C.R. at page 8.

The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Specific Accountabilities:

1. Determine the proper charge (or charges), if any, which should be laid in particular cases by consultation with the investigating police officer.

2. Prepare cases for trial by legal research, consultation with police, interviews with witnesses.

3. Present the more complicated cases in Court thoroughly and impartially, but as efficiently as possible, keeping in mind time constraints on the courts, through adequate planning of the case in its initial stages.

4. Prepare memorandi [*sic*] recommending appeals where the law has not been correctly interpreted in particular cases by viewing the evidence present at the trial, the Judge's decision and the relevant law.

5. Represent the Crown on all summary conviction appeals by preparing written briefs and/or oral arguments before a County Court Judge.

6. Assist junior Prosecuting Officers in an advisory capacity through consultation.

Approved by:

Incumbent: _____ *Date:* July 1980
(signed)

Supervisor: _____ *Date:* July 1980
(signed)

Deputy Minister: _____ *Date:* July 1980
(signed)

10
Performance Appraisal Form

(Blank)

Name: _____ *Position Title:* _____

Division: _____ *Classification:* _____

Department: _____

Appointed to Present Position: _____ *Total Service:* _____

Review Period From: _____ *To:* _____

This form contains four sections:

I *Expected Results*
II *Results Achieved*
III *Analysis of Overall Performance*
IV *Follow-up Action Plans*

Part I:
completed at the beginning of the review period, indicates the major accountabilities of the employee, and the performance goals which have been established in relation to each for the appraisal period.

Part II:
completed at the end of the appraisal period, indicates the actual results achieved in relation to each goal.

Part III:
provides an analysis of the individual's overall performance in terms of significant achievements, requirements for performance improvement, etc.

Part IV:
indicates the follow-up action plans which have been developed in relation to each of the performance areas identified in Part III.

Part I: Expected Results

For each major accountability identified, specify the performance goal(s) to be achieved and the standards by which success will be measured.

1. To consult with and be accessible to police forces operating in the county.

2. To keep abreast of developments in the criminal law which affect pending cases through perusal of available case reports and other legal materials.

3. To prepare and present cases in court in a thorough and professional manner.

4. To manage caseloads efficiently and facilitate the prompt hearing and disposition of cases.

5. To attend upon matters relating to witnesses including subpoenas, notice of adjournments, fees and exhibits.

6. To ensure that matters to be discussed with the Department i.e. plea bargaining situations, the entering of a stay of proceeding and recommendations for appeal are promptly raised with the Assistant Director or Director (Criminal).

7. To implement instructions issued from time to time by the Attorney General.

Part II: Results Achieved

Specify the results achieved in relation to each performance goal previously established.

Part III: Analysis of Overall Performance

Summarize outstanding achievements; performance strengths; weaknesses; etc.

Part IV: Follow-up Action Plans

Specify action plans which have been developed in relation to each of the performance areas identified in Part III.

Summary Comments

Signatures: _____

Manager: _____

Employee: _____

Senior Manager: _____

11
Excerpt from the English *Code for Crown Prosecutors*

The public interest criteria:

7.
Having satisfied himself that the evidence itself can justify proceedings, the Crown Prosecutor must then consider whether the public interest requires a prosecution. The Crown Prosecution Service will be guided by the view expressed in a House of Commons debate by Lord Shawcross when he was Attorney General, and subsequently endorsed by his successors:

"It has never been the rule in this Country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest.' That is still the dominant consideration." (H.C. Deb., Vol. 483, col. 681, January 29th 1951)

He continued by saying that regard must be had to 'the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.'

8.
The factors which can properly lead to a decision not to prosecute will vary from case to case, but broadly speaking, the graver the offence, the less likelihood there will be that the public interest will allow of a disposal less than prosecution, for example, a caution. Where, however, an offence is not so serious as plainly to require prosecution, the Crown Prosecutor should always apply his mind to the public interest and should strive to ensure that the spirit of the Home Office Cautioning Guidelines is observed. If the case falls within any of the following categories this will be an indication that proceedings may not be required, subject of course to the particular circumstances of the case.

(i) *Likely Penalty*

When the circumstances of an offence are not particularly serious, and a Court would be likely to impose a purely nominal penalty, Crown Prosecutors should carefully consider whether the public interest would be better served by a prosecution or some other form of disposal such as, where appropriate, a caution. This applies

particularly where the offence is triable on indictment when Crown Prosecutors should also weigh the likely penalty with the likely length and cost of the proceedings.

(ii) *Staleness*

Regard must be had not only to the date when the last known offence was committed, but also the length of time which is likely to elapse before the matter can be brought to trial. The Crown Prosecutor should be slow to prosecute if the last offence was committed three or more years before the probable date of trial, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed. Less regard will be paid to staleness, however, if it has been contributed to by the accused himself, the complexity of the case has necessitated lengthy police investigation or the particular characteristics of the offence have themselves contributed to the delay in its coming to light. Generally, the graver the allegation the less significance will be attached to the element of staleness.

(iii) *Youth*

The stigma of a conviction can cause irreparable harm to the future prospects of a young adult, and careful consideration should be given to the possibility of dealing with him or her by means of a caution.

(iv) *Old age and infirmity*

(a) The older or more infirm the offender, the more reluctant the Crown Prosecutor should be to prosecute unless there is a real possibility of repetition or the offence is of such gravity that it is impossible to overlook. In general, proceedings should not be instituted where a Court is likely to pay such regard to the age or infirmity of the offender as to induce it to impose only a nominal penalty, although there may be exceptional circumstances, such as where the accused still holds a position of some importance, when proceedings are required in the public interest regardless of what penalty may be imposed.

(b) It will also be necessary to consider whether the accused is likely to be fit enough to stand his trial. The Crown Prosecutor should have regard to any medical reports which have been made available by the defence solicitor and may arrange through him for an independent medical examination where this is necessary.

(v) *Mental illness or stress*

(a) Whenever the Crown Prosecutor is provided with a medical report to the effect that an accused or a person under investigation is suffering from some form of mental illness or psychiatric illness and that the strain of criminal proceedings may lead to a considerable worsening of his condition, such a report should receive anxious consideration. This is a difficult field because in some instances the accused may have become mentally disturbed or depressed by the mere fact that his misconduct has been discovered and the Crown Prosecutor may be dubious about a prognosis that criminal proceedings will adversely affect his condition to a significant extent. Where, however, the Crown Prosecutor is satisfied that the probable effect upon the defendant's mental health outweighs the interests of justice in that particular case, he should not hesitate to discontinue proceedings. An independent medical examination may be sought, but should generally be reserved for cases of such gravity as plainly to require prosecution but for clear evidence that such a course would be likely to result in a permanent worsening of the accused's condition.

(b) The Crown Prosecutor should not pay as much regard to evidence of mental instability not coupled with a prognosis as to the adverse effect of proceedings, as such instability may increase the likelihood that the offence will be repeated. The accused's mental state will, of course, be relevant in considering any issue of mens rea or fitness to plead.

(vi) *Sexual offences*

(a) Whenever two or more persons have participated in the offence in circumstances rendering both or all liable to prosecution the Crown Prosecutor should take into account each person's age, the relative ages of the participants and whether or not there was any element of seduction or corruption when deciding whether, and if so in respect of whom, proceedings should be instituted.

(b) Sexual assaults upon children should always be regarded seriously, as should offences against adults, such as rape, which amount to gross personal violation. In such cases, where the Crown Prosecutor is satisfied as to the sufficiency of the evidence there will seldom be any doubt that prosecution will be in the public interests.

(vii) *Complainant's attitude*

In some cases it will be appropriate for the Crown Prosecutor to have regard to the attitude of a complainant who notified the police but later expresses a wish that no action be taken. It may be that in such circumstances proceedings need not be pursued unless either there is suspicion that the change of heart was actuated by fear or the offence was of some gravity.

(viii) *Peripheral defendants*

Where an allegation involves several accused, as a general rule the Crown Prosecutor should have regard to the need to ensure that proceedings are continued only against those whose involvement goes to the heart of the issue to be placed before the Court. The inclusion of defendants on the fringe of the action and whose guilt in comparison with the principal offenders is minimal can lead to additional delay and cost, as well as unnecessarily clouding the essential features of the case.

9.
Finally, if, having weighed such of the above factors as may appertain to the case, the Crown Prosecutor is still in doubt as to whether proceedings are called for, he will throw into the scales the attitude of the local community and any information about the prevalence of the particular offence in the area or nationally. Should doubt still remain, the scales will normally be tipped in favour of prosecution as if the balance is so even, it could properly be said that the final arbiter must be the Court.

12
U.S. Department of Justice Materials Relating to Prosecutorial Discretion

1977

The following materials are reprinted in their entirety from two Justice Department documents issued under cover of a January 18, 1977, memorandum by then Attorney General Edward H. Levi to U.S. Attorneys and the head of all Justice Department offices, divisions, and bureaus.

The enclosed materials relate to the exercise of prosecutorial discretion by attorneys for the government in such areas as decisions to prosecute, selection of charges, plea agreements involving the reduction or dropping of charges, and agreements to forego prosecution in return for cooperation. These materials have been developed within the Department after a lengthy process of study and consultation. They represent what are believed to be appropriate considerations with respect to the exercise of prosecutorial discretion

in the areas covered and are being provided to you, not as departmental requirements, but for whatever use you may find appropriate in the course of discharging your duties and responsibilities as federal prosecutors.

I wish to emphasize that these materials are not to be construed as Department of Justice "guidelines" and that they impose no obligations on United States Attorneys, their Assistants, or other attorneys for the government. Of course, they confer no rights or benefits, substantive or procedural, enforceable at law by any party to litigation with the United States. They are intended solely for use by attorneys for the government to the extent that they are found to be useful in assisting these attorneys in performing their important functions.

Any comments or suggestions you may have with respect to the enclosed materials should be forwarded to the Office of Policy and Planning of the Department of Justice. - Edward H. Levi, Attorney General.

Decisions To Prosecute, Selection Of Charges, Agreements To Terminate Prosecutions In Return For Guilty Pleas To Fewer Than All Charges, And Opposition To Nolo Contendere *Pleas*

A. *Application*

These materials relate to the exercise of prosecutorial discretion by attorneys for the government with respect to decisions to prosecute or decline prosecution, selection of charges, agreements to terminate prosecutions in return for guilty pleas to fewer than all charges, and opposition to *nolo contendere* pleas.

B. *Decisions to Prosecute*

If the attorney for the government has probable cause to believe that a person has committed a federal offense, it is his duty to determine whether to initiate or recommend prosecution or to decline prosecution.

2.
In determining whether to initiate or recommend prosecution or to decline prosecution, the attorney for the government should weigh all relevant considerations, including:

(a) the seriousness of the offense;
(b) the need to provide a deterrent to similar offences;
(c) the strength of the government's case;
(d) the person's relative culpability in connection with the offense, his history with respect to criminal activity, and his circumstances;
(e) the probable sentence if the person is convicted;
(f) the possibility of civil, administrative, or other proceedings in lieu of prosecution;
(g) the possibility of prosecution in another jurisdiction; and
(h) the availability of prosecutorial and judicial resources.

3.
In determining whether to initiate or recommend prosecution or to decline prosecution, the attorney for the government should not be influenced by:

(a) the offender's race, religion, sex, national origin or political association, activities, or beliefs;
(b) his own personal feelings concerning the offender or the victim; or
(c) the possible effect of his decision on his own personal or professional circumstances.

4.
Whenever a potential prosecution is declined, the attorney for the government should assure that the case file reflects the action taken with respect to the matter and the reason therefor.

13
Excerpt From *Prosecution Policy of the Commonwealth of Australia*

Guidelines for the Making of Decisions in the Prosecution Process

The decision to prosecute

2.10
Sir Hartley Shawcross Q.C., then Attorney General, stated to the House of Commons on 29 January 1951:

"The truth is that the exercise of a discretion in a quasi-judicial way as to whether or when I must take steps to enforce the criminal law is exactly one of the duties of the office of the Attorney-General, as it is of the office of the Director of Public Prosecutions.... It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution.... (T)he public interest ... is still the dominant consideration." (See H.C. Debates, Vol. 483, col. 681.)

This statement is equally applicable to the position in Australia. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution.

2.11
The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

2.12
It follows that the objectives previously stated - especially fairness and consistency - are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.

2.13
In deciding whether or not a matter should be prosecuted any views put forward by the A.F.P., or the Department responsible for the administration of the law in question, are carefully taken into account. Ultimately the decision is to be made having regard to the considerations referred to below.

2.14
The initial consideration in the exercise of this discretion is whether the available evidence establishes a prima facie case; that is to say, on the basis that the available evidence is accepted without reservation by a jury it could, acting responsibly, be satisfied of the defendant's guilt beyond reasonable doubt. In this regard, if a prosecution has already commenced but on an objective assessment there is not, nor will there be, a prima facie case, the prosecution should not proceed.

2.15

The second major consideration is whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires the prosecution to be pursued. In deciding whether the public interest requires a prosecution a wide variety of factors can properly be taken into account, many of which are referred to below. Dominant in this context is that ordinarily the public interest will not require a prosecution unless it is more likely than not that it will result in a conviction. Such an assessment requires a dispassionate evaluation of how strong the case is likely to be when presented in court. It must take account of such matters as the availability and credibility of witnesses and their likely impression on a jury, the admissibility of any alleged confession and the impact of any likely defence on a jury or other arbiter of fact. It may also be relevant that the particular offence or offender has characteristics which motivate juries towards acquittal. This assessment may be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In such cases of doubt it may still be appropriate to proceed with the prosecution when regard is had to any other relevant public interest factors, provided a conviction is reasonably open on the available evidence. On the other hand, the public interest may require that a prosecution not be brought although a conviction is more likely than not.

2.16

Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;
(b) any mitigating or aggravating circumstances;
(c) the youth, age, physical health, mental health or special infirmity of the alleged offender or a witness;
(d) the alleged offender's antecedents;
(e) the staleness of the alleged offence;
(f) the degree of culpability of the alleged offender in connection with the offence;
(g) the effect on public order and morale;
(h) the obsolescence or obscurity of the law;
(i) whether the prosecution would be perceived as counter-productive, for example, by enabling the defendant to be seen as a martyr;
(j) the availability and efficacy of any alternatives to prosecution;
(k) the prevalence of the alleged offence and the need for deterrence,

both personal and general;
(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
(m) whether the alleged offence is of considerable public concern;
(n) any entitlement of the Commonwealth or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;
(o) the attitude of the victim of the alleged offence to a prosecution;
(p) the likely length and expense of a trial;
(q) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

(r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
(s) whether the alleged offence is triable only on indictment; and
(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

2.17
Special considerations apply to the prosecution of persons under the age of 16 years. Prosecution action against children should be used sparingly and in making a decision whether to prosecute particular consideration should be given to available alternatives to prosecution, such as a caution or reprimand, as well as the sentencing alternatives available to the relevant Children's Court if the matter were to be prosecuted. The practice of the D.P.P. is that any decision to prosecute a child under 16 years of age should be taken by a senior lawyer, usually the Deputy Director of the Branch Office concerned.

2.18
A decision whether or not to prosecute must clearly not be influenced by:

(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
(b) personal feelings concerning the offender or the victim;
(c) possible political advantage or disadvantage to the Government or any political group or party; or
(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

14
Nova Scotia Policy Directive on Disclosure

September 15, 1986

From: The Honourable Ronald C. Giffin, Attorney General
To: Prosecuting Officers and Assistant Prosecuting Officers
Subject: Policy Directive on Disclosure
Date: September 15, 1986

The Crown shall make full disclosure of its case to the accused, or counsel for the accused. The accused is entitled to any statements that he or she has made. In addition, the Crown shall make available to the accused, or counsel, statements of all witnesses indicating which witnesses the Crown intends to use. Whenever possible, copies shall be provided upon request. In most cases, the Crown Sheet prepared by the police which details the facts in support of the charge laid may be made available to the defence. It is incumbent upon the Crown to fully disclose all statements and other evidence which it intends to present when the same is known at the earliest opportunity.

Notwithstanding the above, disclosure may be limited or withheld by the Crown in any of the following situations:

1. Where there are reasonable grounds to believe that there may be destruction of evidence or, intimidation or threats to the well being of a witness.

2. The statement, and address of a young sexual assault victim may be withheld if there is concern that provision of that young person's statement and whereabouts to the defence may result in excessive stress for that witness.

3. Any other situation where upon perusal of the file, it is felt that disclosure would be contrary to the interests of justice.

In any case in which it is felt that full disclosure should not be made, this must be referred to the Director (Prosecutions) for decision and instructions.

Prosecuting Officers are reminded that in no case should a file be turned over to the defence for perusal, without the file having first been checked to ensure that it does not contain any confidential or extraneous material or police reports containing expressions of personal views or opinions of the police investigator which ought not to be disclosed to the defence.

(signed)

Honourable Ronald C. Giffin

15
Nova Scotia Disclosure Guidelines

July 18, 1988

From: Hon. Terence R.B. Donahoe, Q.C., Attorney General
To: Prosecuting Officers and Assistant Prosecuting Officers
Subject: Disclosure Guidelines
Date: July 18, 1988

It is recognized that there is a general duty upon the Crown to disclose the case in chief for the prosecution to counsel for the accused, and to make defence counsel aware of the existence of all relevant evidence. The Crown, in giving disclosure, must be cognizant of the importance of reviewing information received, prior to disclosure. Matters of opinion expressed or information which on public policy grounds could jeopardize a state or individual interest, should be subject to careful scrutiny.

The purpose of disclosure by the Crown of the case against the accused is threefold:

(a) to ensure the defence is aware of the case which must be met, and is not taken by surprise and is able to adequately prepare their defence on behalf of their client;
(b) to resolve non-contentious and time-consuming issues in advance of the trial in an effort to ensure more efficient use of court time;
(c) to allow for the entering of guilty pleas at a date early in the proceedings.

The guiding principle should always be full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution.

Pursuant to this duty, and bearing in mind the above principles, upon request, the accused is entitled to full disclosure of the case in chief for the Crown and in this context full disclosure shall mean the provision to counsel for the accused, as soon as reasonably practical, but in any event prior to the preliminary inquiry or trial, as the case may be, of the following information:

(a) The circumstances of the offence. This will usually be disclosed by means of the provision of a summary prepared by the investigating police agency of the case as a whole.
(b) Copies of all written statements made by witnesses.
(c) A copy of any statement made by the accused to persons in authority and in the case of verbal statements, a verbatim account of the statement.
(d) A copy of the accused's criminal record.
(e) Copies of medical and laboratory reports.

(f) Access to any exhibits intended to be introduced and where applicable, copies of such exhibits.
(g) A copy of the wording of the charge.

Additional disclosure beyond what is outlined above is to be at the discretion of the prosecutor balancing the principle of full and fair disclosure with the need to prevent endangering the life or safety of witnesses or interference with the administration of justice. Such additional disclosure may include names and addresses of any potential witnesses keeping in mind possible need for protection from intimidation or harassment.

Where an accused is not represented by counsel it is recognized that in order to maintain a proper arms-length relationship with an accused, the method of disclosure of evidence must remain in the discretion of the prosecutor responsible for the prosecution.

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes known to the prosecution without need for a further request for disclosure.

(signed)

Terence R.B. Donahoe

16
Uniform Law Conference of Canada, Proposed Disclosure Guidelines

1985

It is recognized that there is a general duty upon Crown Counsel to disclose the case in chief for the prosecution to counsel for the accused, and to make defence counsel aware of the existence of all relevant evidence. The Crown, in giving disclosure, must be cognizant of the importance of reviewing information received, prior to disclosure. Matters of opinion expressed or information which on public policy grounds could jeopardize a state or individual interest, should be the subject of careful scrutiny.

The purpose of disclosure by the Crown of the case against the accused is threefold:

(a) to ensure the defence is aware of the case which must be met, and is not taken by surprise and is able to adequately prepare their defence on behalf of their client;
(b) to resolve non-contentious and time-consuming issues in advance of the trial in an effort to ensure more efficient use of court time;

(c) to encourage the entering of guilty pleas at a date early in the proceedings.

The guiding principle should always be full and fair disclosure restricted only by a demonstrable need to protect the integrity of the prosecution.

Pursuant to this duty, upon request, the accused is entitled to full disclosure of the case in chief for the Crown and in this context full disclosure shall mean the provision to counsel for the accused, as soon as reasonably practical, but in any event prior to the preliminary or trial, as the case may be, of the following information:

(a) The circumstances of the offence. The method of providing the circumstances may include the provision of contents of the police report, the provision of a summary prepared by the investigating policy agency of the case as a whole, the provision of a summary of witnesses' statements or the contents of witnesses' statements.
(b) A copy of any statement made by the accused to persons in authority and in the case of verbal statements, a verbatim account of the statement.
(c) A copy of the accused's criminal record.
(d) Copies of medical and laboratory reports.
(e) Access to any exhibits intended to be introduced and where applicable, copies of such exhibits.
(f) A copy of the information.

Additional disclosure beyond what is outlined above is to be at the discretion of the Crown Attorney responsible for the prosecution balancing the principle of full and fair disclosure with the need to prevent endangering the life or safety of witnesses or interference with the administration of justice. Such additional disclosure may include the following:

(a) Copies of the Criminal records of witnesses.
(b) Names and addresses of any potential witnesses keeping in mind possible need for protection from intimidation or harassment.

The method of disclosure of evidence to an unrepresented accused remains in the discretion of the Crown Attorney responsible for the prosecution.

It is understood that there is a continuing obligation on the prosecution to disclose any new relevant evidence that becomes

known to the prosecution without need for a further request for disclosure.

It is recognized that the precise mechanics or procedure for providing disclosure will vary from jurisdiction to jurisdiction throughout the country keeping in mind that full and fair disclosure should be given unless there is a demonstrable need that such full and fair disclosure should not be given.

17
Law Reform Commission of Canada, Disclosure Proposals

1984

Part XIV.2 Disclosure

462.5
A judicial officer shall not proceed with a criminal prosecution at the time that the accused first appears unless he has satisfied himself

(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against him in that prosecution; and
(b) that the accused has been advised of his right to request disclosure under Section 462.6.

462.6
(1) Upon request to the prosecutor, the accused is entitled before being called upon to elect mode of trial or to plead to the charge of an indictable offence, whichever comes first and thereafter:

(a) to receive a copy of his criminal record;
(b) to receive a copy of any relevant statement made by him to a person in authority and recorded in writing (or to inspect such a statement if it has been recorded by electronic means);
(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, to receive copies thereof;
(d) to receive a copy of any relevant statement made by a person whom the prosecutor proposes to call as a witness and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness;
(e) to inspect the electronic recording of any relevant statement made by a person whom the prosecutor proposes to call as a witness;
(f) to receive, where his request demonstrates the relevance of such information, a copy of the criminal record of any victim or proposed witness; and
(g) to receive, where known to the police officer or prosecutor in charge of the investigation, and not protected from disclosure by law, the name and address of any other person who could be called as a

witness, or other details enabling that person to be identified, unless, upon an *ex parte* application by the prosecutor supported by an affidavit demonstrating that disclosure will probably endanger life or safety or interfere with the administration of justice, a judicial officer having jurisdiction in the matter orders in writing and with reasons, that disclosure be delayed until a time fixed in the order.

(2) A request under Subsection (1) imposes a continuing obligation on the prosecutor to disclose the items within the class requested, without need for a further request.

(3) A statement referred to in paragraph (b), (d) or (e) of Subsection (1) does not include a communication that is governed by Part IV.1 of this Act.

462.7
Where a judicial officer having jurisdiction in the matter is satisfied that there has not been compliance with the provisions of Section 462.6, he shall, at the accused's request, adjourn the proceedings until in his opinion there has been compliance and he may make such other order as he considers appropriate in the circumstances.

18
Nova Scotia Policy on Plea Bargaining

1985

(i) Negotiations with Defence Counsel Concerning Plea and Sentence

Periodically, a Prosecuting Officer may be approached by Defence Counsel who offers to plead his or her client guilty either:

(a) in return for the Crown reducing the charge to a less serious, included offence, or
(b) in return for a specific recommendation by the Crown to the sentencing Judge as the quantum of sentence, or
(c) in return for the Crown withdrawing another charge.

With respect to situation (a) above, the decision as to whether to enter into the arrangement proposed must be one for the Prosecuting Officer in the first instance, except where the offence charged is first or second degree murder. He or she must be satisfied that a plea to a reduced charge will not bring the administration of justice into disrepute. In reaching such a conclusion, the Prosecuting Officer may wish to consult with the Assistant Director* or Director (Criminal). Where the charge is murder, it will be necessary to seek the approval of the Department where Defence Counsel offers to enter a plea of guilty to the included offence of manslaughter.

* Now the Director (Prosecutions)

Any arrangement proposed which goes beyond the Crown agreeing to reduce the charge to a less serious, included offence, must be approved by the Assistant Director or Director (Criminal). This would encompass situations where in return for a guilty plea, the Crown is asked to make a specific recommendation as to the quantum of sentence or where the Crown is asked to withdraw one or more of multiple charges in return for an accused entering a plea of guilty to another of the charges laid.

Assistant Prosecuting Officers are advised that they must seek the approval of the Prosecuting Officer for the County prior to concluding any negotiations with the Defence concerning plea and sentence.

The Appeal Division of the Supreme Court of Nova Scotia has stated that "plea bargaining" is not to be regarded with favour. However, the Court has recognized that the Crown and Defence Counsel will enter into such arrangements from time to time. It must always be kept in mind that any agreement by the Crown on a specific recommendation to be put forward as to the quantum of sentence must accord with the principles of sentencing and the range of sentences enunciated by the appellate courts for the particular type of crime involved.

(ii) Addendum, 1985

To: All Prosecutors
From: David W. Thomas, Q.C., Crown Prosecutor's Office
Date: November 22, 1985
Re: Plea Bargaining

Your attention is directed to Section 7.21 of Volume 1, Advice to Prosecuting Officers, wherein you will note that *Assistant Prosecuting Officers*

"are advised that they must seek the approval of the Prosecuting Officer for the County prior to concluding any negotiations with the defence concerning plea and sentence."

Section 7.20 sets out the procedure to be followed by the *Prosecuting Officer.*

As a general statement of policy to be followed by *Assistant Prosecuting Officers* in Halifax County, it is my view that the

position you should take is that you will recommend either local or federal time and that you should not be specific as to the length of time.

You may go a step further and indicate that you feel lengthy local or federal time would be appropriate, or alternatively, a short local term or a term in a federal institution. Sentence is a matter for the court. If either party feels aggrieved by the sentence the appropriate remedy is to appeal same.

19
Manitoba Guidelines on Plea Bargaining and Sentence Recommendations

April 29, 1987

Date Effective: April 29, 1987
Subject: Plea Bargaining and Sentence Recommendations
Purpose: To establish guidelines for Crown counsel in plea and sentence bargaining situations.

Central Issues

Plea bargaining will include all situations where an accused offers to plead guilty to charges other than those originally laid (*i.e.* lesser and included offences or otherwise less serious offences) or to only some of such charges with the balance being stayed or withdrawn. Sentence bargaining will include situations where Crown Counsel agrees to recommend a sentence (including sentence ranges) to the Court in consideration of a plea of guilty being entered. Such agreements may be entered into subject to the following guidelines.

1. The laying of criminal charges should be based on only one consideration - a careful examination of police investigation reports to determine the appropriate charge or charges founded upon available reliable and admissible evidence in support thereof.

2. The acceptance of a plea of guilty to a lesser charge should be based on the nature and quality of the evidence available as a result of the exchange of particulars and discussions with defence counsel and further discussions with police investigation officers. The decision on the appropriate charge should never be made on the basis of convenience or expediency.

3. Offers of guilty pleas to lesser charges or withdrawal of some charges in exchange for guilty pleas to the balance of charges are not to be accepted for the purpose of avoiding trial on all charges where the available evidence is such that it would likely support a finding of guilty on all charges in a trial situation.

4. Notwithstanding the general purport of guideline number three, there may be exceptions in situations where a multiplicity of charges are laid which arise out of a single delict. In some of these situations the law as stated in *R.* v. *Kienapple* will operate in determining which charge(s) should be stayed, withdrawn or proceeded with. The same criteria, *inter alia*, should be considered in assessing an offered plea of guilty.

Other policy guidelines which have been developed to deal with particular offences (such as alcohol related driving offences) and including the principal of totality of sentence, must also be borne in mind when assessing a disposition suggested by defence counsel.

5. The principal consideration in withdrawing charges or substituting less serious charges than those originally laid is the character and quality of the evidence available to support the Crown's case. The administration of criminal justice is not to be laboured with trials of charges which cannot realistically lead to a finding of guilt having regard to the overall strength of the Crown's case and most particularly the character and quality of the evidence on which the Crown relies. It is, however, to be considered improper to withdraw charges or substitute less serious charges only on condition that a plea of guilty is entered by the accused. The Crown is obligated to ensure that only the proper charges are before the Court whether it be for trial or plea.

6. It is improper Crown practice to withhold any material, factual information or evidence from the Court in exchange for a plea of guilty from the accused. The Court accepting the plea must be apprised of all the facts if it is to effectively discharge its responsibility to the community in passing sentence.

7. Though very rare, there are situations where the Crown may properly decide to stay proceedings or withdraw charges on compassionate or humanitarian grounds or in cases where the system of criminal justice would be brought into disrepute by the furtherence of a particular prosecution.

8. Each and every Crown Counsel is an Agent of the Attorney General and has a duty not to enter into any improvident agreement in respect of sentence or other disposition. The duty of Crown Counsel is to represent the public interest in the administration of justice in the Province. Any doubt about the propriety or reasonableness of a proposed disposition in the circumstances of a

particular case should be reviewed with the Director of Criminal Prosecutions.

Specific Issues

1. The Judiciary should not generally be brought into the bargaining process. A directive from the Chief Provincial Court Judge, contains the following, with which this Department is in accord:

"The only situation in which it would be appropriate for counsel for either the Crown or the accused to make representations jointly outside of court, would be where the information is critical to the sentencing process and yet should not be subjected to the scrutiny of a courtroom. It is difficult to draw specific guidelines but I would suggest that included in this category would be instances where the accused might be an informant; where a psychiatric report might contain information which could adversely affect innocent persons or the accused; where there is medical information which should remain confidential, such as the terminal illness of an accused, etc."

2. Plea or sentence bargains should not be entered into in advance of the preparation of a pre-sentence report. Difficulties have arisen where probation officers have been of a different view than the Crown with the result that the pre-sentence report has made the plea bargain seem unreasonable. There is no way of predicting what a pre-sentence report will contain and it may often undermine the terms of the agreement. It is a dangerous practice and should be avoided.

3. Crown Attorneys prosecuting in Provincial Court should not attempt to bind the Queen's Bench prosecution staff with respect to plea or sentence discussions. This will apply to all cases, including consent committals. With consent committals there should be an undertaking by defence counsel *and* the accused to enter a guilty plea to the agreed charges in the Court of Queen's Bench but any discussions with respect to sentence must be had with the Queen's Bench Crown Attorney.

4. All Crown Counsel are reminded of the decision of the Manitoba Court of Appeal in *R.* v. *Simoneau* (1978) 2 C.R. (34) S-17. This decision forms the basis of this Department's policy on the subject of sentence bargaining. Crown Attorneys are permitted to entertain recommendations as to both ranges of sentence and specific sentences. Such recommendations will be based upon a fair

disposition in accordance with precedent and established sentencing practice in similar cases.

5. All Crown Attorneys are advised to seek a second opinion whenever in doubt and senior counsel should be consulted in all serious cases. In particular, all homicide cases in which a reduction in charge is sought must be first discussed with the Director of Criminal Prosecutions.

These guidelines supercede and replace all previous directives on matters contained herein.

Date Effective: January 5, 1983
Subject: Procedure - Docket Operations Provincial Court

1. The docket Crown Attorney will have overall responsibility for the correct laying of charges on the dockets. This will include reviewing those charges laid by the police on their own initiative.

2. Briefing on new arrests should start as close to 9:00 a.m. as possible and the docket Crowns should attend their respective courtrooms as close to 9:30 a.m. as possible to deal with counsel.

3. All homicide charges should have the approval of the Senior Crown Attorney. In addition the Senior Crown Attorney must be kept advised of all "serious" cases, either by inviting him in to the morning briefing or by dropping by his office after court. All such cases are to have their hearings expedited and if necessary custody dates may be used even when the accused has made bail.

4. Every effort should be made to start court at 10:00 a.m. sharp and by 10:15 on the day after a holiday. Defence counsel should be discouraged from arriving at the last minute and expecting to be dealt with prior to court commencement.

5. Docket Crown Attorneys are not normally assigned to other duties. They are expected to use the available afternoons to review and familiarize themselves with all files, to ensure that the proper charges have been laid and the evidence is available, to entertain plea bargains, and to assist with the giving out of particulars on "serious cases" where time permits.

6. All efforts should be made to plea bargain and obtain guilty pleas at the docket level. Any discussions in this regard should be placed on the file to prevent "Crown shopping".

7. In light of s.11(d) of the *Charter* (trial within a reasonable time) reasons for each and every delay should be apparent from the file. Requests for adjournments should indicate at whose request the adjournment is being asked.

8. Telephone remands will not normally be accepted barring exceptional circumstances, *e.g.*, sickness or weather. I see no problem, however, in accepting written requests for remands made prior to Court.

9. As a general rule the Crown would be expected to consent to one remand past the date on which particulars are given out. This should be ample time for counsel to discuss the particulars with the accused and make any approaches to the Crown.

10. Please ensure that the accused indicates his election on the record in indictable offences. Similarly, the Crown should, on first appearance, be prepared to indicate its election in dual procedure offences.

11. The Police Identification Division will advise of those accuseds who fail to appear as required by the *Identification of Criminals Act*. Please ensure that counsel bring their clients in for this purpose, failing which a warrant should be requested.

12. Departmental policy is to require that persons in custody have their hearings expedited. Keeping in mind s.11(d) of the Charter and s.457 C.C. delay can only work to the prejudice of the Crown, even when defence counsel appears in no hurry to proceed. The onus is on the Crown and s.457 makes the custodial officer responsible. Any defence occasioned delay should be clearly on the record and there is no reason why the 90 day rule is not always complied with.

13. Please ensure that enough time is set for the hearing of cases. This by itself, is a good reason for the Crown to read all files as the number of witnesses listed on the P-6 is not always accurate. It is better to err on the side of setting too much time as continuations are more difficult to schedule than are the original trial dates. Similarly, the docket Crown is responsible for the identification of all Calendar Court cases which will normally require a reasonably accurate assessment of time requirements.

14. When a person is in custody and no charge is to be laid, that person should not be brought into court. Rather the Crown Attorney should instruct the appropriate Inspector to complete an "Order for Discharge of a Person in Custody" to ensure that the person is released directly from the Remand Centre.

15. There are to be no additions to a docket without the express consent of a Crown Attorney who will exercise discretion with due regard for time constraints. Generally speaking, an accused cannot be denied access to the Court but by the same token the Crown cannot be forced to proceed without reports and unprepared.

16. Please ensure that at least one clear calendar week is given to remands to either Calendar Court or Screening Court, unless that Crown Attorney agrees to an earlier remand.

17. All requests for appeals should be cleared first with the Senior Crown Attorney.

18. Whenever in doubt - discuss. That's what we're here for.

Wayne Myshkowsky
Director, Criminal Prosecutions

20
New Brunswick
Plea Bargaining Policy

Policy

1. Crown Prosecutors, in carrying out their responsibilities, shall not "plea bargain". For this purpose, a "plea bargain" includes:

a) the withdrawal of a charge which is substantiated by the evidence in return for a guilty plea on a lesser charge, simply to avoid a trial;
b) the withdrawal of a charge which is substantiated by the evidence in return for a guilty plea on another charge simply to avoid a trial;
c) an agreement not to appeal whatever sentence the Judge imposes, in exchange for a guilty plea;
d) an agreement to "play down" certain facts in exchange for a guilty plea. Under no circumstances can the Crown be permitted to "go easy" on the facts in exchange for a guilty plea. All of the facts relating to the incident must be disclosed to the Judge;
e) an agreement not to introduce a relevant criminal record in exhange for a guilty plea;
f) an agreement to deal with the matter at a time other than the normal court time for dealing with such matters in order to avoid the "press".

2. The only exceptions to this policy will be where public interest factors such as expense, time or difficulty dictate any variation from the above and only where the consent of the Deputy Attorney General, Assistant Deputy Attorney General or Director of Public Prosecutions is obtained.

Guidelines

1. It is recognized that considerable latitude must be given to the Crown Prosecutor to discuss with defence counsel the circumstances of the case. If the issue of sentence arises during such conversations, the Crown should indicate, if requested, what it is looking for in the way of sentence and in so doing may acknowledge that a guilty plea is a mitigating factor in Canadian jurisprudence.

2. None of the foregoing restricts the proper exercise of Prosecutorial discretion in accepting a guilty plea to a lesser offence because of evidentiary or witness-related problems. If, for example, the Crown discovered in preparing for trial on a theft charge that the continuity of the stolen property could not be established thereby preventing its acceptance as an exhibit or the owner of the stolen goods who was required to prove ownership had moved to British Columbia, it would be appropriate for the Crown Prosecutor to accept a guilty plea to the lesser offence of possession of stolen property provided, of course, the evidence supported that charge.

21 Canadian Sentencing Commission Recommendations on Plea Bargaining

13.1
The Commission recommends that the interests of the victim in plea negotiations continue to be represented by Crown counsel. To encourage uniformity of practice across Canada, the responsible federal and provincial prosecutorial authorities should develop guidelines which direct Crown counsel to keep victims fully informed of plea negotiations and sentencing proceedings and to represent their views.

13.2
The Commission recommends that, where possible, prior to the acceptance of a plea negotiation, Crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim.

13.3
The Commission recommends that the sentencing judge inquire of the defendant whether he or she understands the plea agreement and its implications and, if he or she does not, the judge should have the discretion to strike the plea or sentence.

13.4
The Commission recommends that federal and provincial prosecutorial authorities collaborate in the formulation of standards or guidelines for police respecting over-charging and/or inappropriate multiple charging.

13.5
The Commission recommends that the relevant federal and provincial authorities give serious consideration to the institution of formalized screening mechanisms to permit, to the greatest extent practicable, the review of charges by Crown counsel prior to their being laid by police.

13.6
The Commission recommends that police forces develop and/or augment internal review mechanisms to enhance the quality of charging decisions and, specifically, to discourage the practice of laying inappropriate charges for the purpose of maximizing a plea bargaining position.

13.7
The Commission recommends that the relevant federal and provincial prosecutorial authorities establish a policy (guidelines) restricting and governing the power of the Crown to reduce charges in cases where it has the means to prove a more serious offence.

13.8
The Commission recommends that the appropriate federal and provincial authorities formulate and attempt to enforce guidelines respecting the ethics of plea bargaining.

13.9
The Commission recommends a mechanism whereby the Crown prosecutor would be required to justify in open court a plea bargain agreement reached by the parties either in private or in chambers unless, in the public interest, such justification should be done in chambers.

13.10
The Commission recommends that the trial or sentencing judge never be a participant in the plea negotiation process. This recommendation is not intended to preclude the judge from having the discretion to indicate in chambers the general nature of the disposition or sentence which is likely to be imposed upon the offender in the event of a plea of guilty.

13.11
The Commission also recommends that the *Criminal Code* be amended to expressly provide that the court is not bound to accept a joint submission or other position presented by the parties respecting a particular charge or sentence.

13.12
The Commission recommends the development of a mechanism to require full disclosure in open court of the facts and considerations which formed the basis of an agreement, disposition or order arising out of a pre-hearing conference.

13.13
The Commission recommends that an in-depth analysis of the nature and extent of plea bargaining in Canada should be conducted by the federal and provincial governments or by a permanent sentencing commission.

22
Nova Scotia Policy on Summaries to Trial Judges

(i) Guidelines of April 15, 1983

From: Martin E. Herschorn, Assistant Director (Criminal)
To: Prosecuting Officers and Assistant Prosecuting Officers
Subject: Guidelines for Preparation of Summaries for Trial Judges
Date: April 15, 1983

The following guidelines are to apply to the preparation of summaries for trial Judges with respect to criminal jury trials in the Trial Division of the Supreme Court of Nova Scotia. The Judges of the Trial Division have expressed a desire for greater uniformity in the information provided to them by Prosecuting Officers. It is hoped that these guidelines will assist in providing the Court with all necessary and relevant information.

1. As soon as possible and, in any event, not later than 14 days before the opening day of the criminal sittings, the Prosecuting

Officer should prepare and forward to the trial Judge, a summary which should include:

(a) a summary of facts,
(b) a brief of the law, indicating relevant sections, authorities and wherever possible, appropriate comments relating the facts to the law as well as a brief statement of the position of the Crown with regard to the points of law. The Crown should alert the trial Judge as to any *voir dire* which will be required at trial together with any other matters that the Crown Prosecutor anticipates will arise during the course of the trial;
(c) if it is the practice in your County for Judges of the Trial Division to sentence an accused immediately following the rendering of a verdict by the Jury, rather than reserving and having the accused brought back to Court on a subsequent day, your summary should also include references to relevant case authorities on sentence for the offence concerned. This will assist the Judge in reviewing the relevant case law in advance of the sentencing hearing and thereby facilitate the imposition of sentences which will conform with proper principles of sentencing.

2. In addition to the summary, the trial Judge should also be provided with:

(a) a copy of the Indictment with the names of the witnesses endorsed thereon,
(b) a copy of the preliminary inquiry transcript, if any.

(ii) Summary to Trial Judge, *The Queen* v. *Donald Marshall, Jr.*, October 12, 1971

The Queen on the Information of Sgt. Det. John F. MacIntyre v. Donald Marshall, Junior

Charge

Donald Marshall, Jr. did at Sydney, in the County of Cape Breton, Province of Nova Scotia, on or about the 28th day of May,1971, murder Sanford William (Sandy) Seale, contrary to Section 206(2) of the *Criminal Code of Canada*.

Witnesses:

Dr. Mohamad Ali Naqvi
Dr. David Gaum
Carl MacDonald
Roy Gould
Donald Marshall, Senior
Sgt. Michael R. MacDonald
Patricia Ann Harriss
Terrance Gushue
Maynard Vincent Chant
John Pratico
Robert MacKay
Brian Doucette
Leo Curry
Pearl MacMillan
Dr. Mohan S. Virick
Mrs. Merle Faye Davis
Aldophus James Evers
Sandra Catherine Mrazek
Cst. John Mullowney
Det.-Sgt. John F. McIntyre

Statement of Facts

On the 27th [*sic*] May, 1971 (a Saturday night) a dance was being held at a local hall (St. Joseph's Parish Hall) with a number of witnesses in attendance. Near midnight the participants at the dance began to leave.

A Mr. John Pratico met the accused and the deceased, Sandy Seale, at the corner of Argyle and George Streets in Sydney, and was invited by the accused to go into Wentworth Park with them by the accused. Mr. Pratico did not like the way the invitation was extended so he declined and proceeded along up Argyle St. to Crescent Street which skirts the edge of Wentworth Park. He proceeded along Crescent Street until he neared the intersection of Crescent Street and Bentinck Street. There he stepped behind a shrub in Wentworth Park in order to consume a pint bottle of beer. While behind this shrub he saw the accused and the late Mr. Seale walk along Crescent Street and engage in an argument, or at least a loud discussion. As he watched he saw the accused remove a knife from his right hand pocket and plunge it into the stomach of the deceased. He then panicked and ran from the scene to his home.

Meanwhile one Maynard Vincent Chant will testify that he missed his bus to his home at Louisbourg and that he proceeded down Bentinck Street, and coming to the railroad tracks that run through Wentworth Park he proceeded along these railroad tracks as a short cut to George Street where he intended to hitch-hike a drive home. As he walked along the tracks he noticed, and can identify, Mr. John Pratico sitting behind a shrub watching two men in an argument on Crescent Street. He proceeded about thirty feet beyond Mr. Pratico and stopped to observe what was going on. He knew both the accused and Mr. Seale and he saw Mr. Marshall, the accused, draw a knife from his pocket and plunge it into the abdomen of Mr. Seale, the deceased. He panicked and ran down the tracks and cut over a path to Byng Avenue, another street skirting Wentworth Park on the opposite side from Crescent Street.

While on Byng Avenue he saw the accused running down Bentinck Street and turn into Byng Avenue towards him. Mr. Chant turned to walk in the opposite direction when the accused caught up to him and told him that he and his friend, Mr. Seale, had been attacked by two men, one stabbed his friend, Mr. Seale, in the abdomen and he received a cut in the arm defending himself. This conversation took place in front of a house occupied by a Mr. Mattson, a former RCMP officer, who is expected to testify.

The accused showed Mr. Chant his forearm that was injured but no blood was in appearance. These two men stopped a passing automobile, the operator unknown, and were taken back to the scene where Mr. Seale was still alive, but beyond reasonable senses. Help was then summoned. Mr. Chant at first related to the police the story the accused gave him but later advised that he related the false story because of fear of the accused. He knew and can identify both men involved in the offence.

Dr. M.A. Naqvi and Dr. D. Guam will testify as to the identification of the deceased and the efforts put forth to save his life and the cause of death.

Carl MacDonald will introduce the plans of Wentworth Park and the surrounding streets and area.

Roy Gould will testify that he loaned the jacket in question to the accused on the night in question, that it was in good condition on the evening in question and its condition on recovery from the father of the accused. It was bloodstained and torn.

Donald Marshall, Senior, who is the father of the accused, will testify that he returned the jacket to its owner, Mr. Roy Gould.

Det. Michael R. MacDonald, a member of the City of Sydney Police Force, took the exhibit jacket from Mr. Gould and took it to the RCMP Crime Laboratory in Sackville, N.B.

Patricia Ann Harriss, who is 14 years of age, will testify that she left the dance with Terry Gushue at approximately 11 P.M. They went into Wentworth Park to the bandshell where they spent some time. Then they proceeded along Crescent Street at approximately 11:45 P.M. where they met the accused, and another man who she cannot identify. A conversation took place and they continued along to her home.
Miss Harriss had known the accused before.

Terence Patrick Gushue will give the same evidence as Miss Harriss.

Maynard Vincent Chant, who is 14 years of age and lives in Louisbourg, will testify that he missed the bus that was going to Louisbourg and that he walked down Bentinck Street to the railway tracks that run through Wentworth Park. As he walked along the tracks he noticed John Pratico hunched behind a bush watching something on Crescent Street. Mr. Chant stopped to see what Mr. Pratico was observing and saw two men talking to each other. Mr. Chant saw the accused haul a knife out of his pocket and drive it into the stomach of the other man. This other man keeled over and Mr. Chant ran away towards George Street. He cut off into a path to Byng Avenue. As he proceeded along Byng Avenue he saw the accused running down Bentinck Street and turn into Byng Avenue. Mr. Chant turned around but the accused caught up to him in front of a house occupied by Mr. M. Mattson. Here the accused showed his arm and said "Look what they did to me". The accused told him that two men attacked he and his buddy and that the buddy was over at the park with a knife in his stomach. The accused stopped a passing car and he and Mr. Chant were driven over to Crescent Street where Mr. Chant placed his shirt on the stomach of Mr. Seale. Mr. Chant remained there until Mr. Seale was taken away in the ambulance.

John Pratico will testify that he knew the accused and met him near the corner of George Street and Argyle Street. He declined an invitation by the accused to go into Wentworth Park. He then went down Argyle Street to Crescent, which he walked along until he came to a bush which he went behind in order to have a pint of beer. As he was there he saw the accused and the deceased talking or

arguing, he saw the accused haul something from his pocket and stab Seale. Seale dropped and Mr. Pratico ran away from the scene. Mr. Pratico knew both Mr. Marshall and Mr. Seale before the night in question.

Robert MacKay, who was attending the dance, left with Miss Debbie MacPherson around 11:40 P.M. They sat at the bandshell in Wentworth Park for a few minutes, then proceeded along Crescent Street. As they walked along they saw Sandy Seale lying on the street. He asked for help because he was stabbed. Mr. MacKay sent Miss MacPherson on her way and ran for help. He returned just as the automobile with the accused returned to the scene. Mr. MacKay and the accused went to a house to ask for an ambulance to be called.

Brian Doucette will testify that he was asked by the accused and another man to call an ambulance. When the ambulance arrived Mr. Doucette accompanied the ambulance to the hospital. The accused showed Mr. Doucette his injured arm and there was no blood.

Leo Curry will testify that he was the ambulance driver that took Mr. Seale to the hospital and stayed with the deceased until the doctor arrived.

Pearl MacMillan, a lab technician at the Sydney City Hospital, will testify that she typed the blood of Sandy Seale and found it to be "O" positive.

Dr. Mohan S. Virick will testify that he examined Donald Marshall and found that he had a laceration on the left arm which he sutured. There was no bleeding from this cut. It was a superficial laceration.

Mrs. Merle Faye Davis will testify that she is a nurse at the Sydney City Hospital and that she examined Donald Marshall on his arrival at the Hospital. She will describe the condition of Mr. Marshall's arm and that there was no blood on the arm when he entered the hospital.

Mr. Aldophus James Evers will testify that he is with the RCMP Crime Laboratory in Sackville. He will testify that he received the Exhibits from Sgt. Michael MacDonald on June 16th, 1971. These exhibits were a light brown jacket and a bright yellow jacket. He passed these exhibits on to Miss Mrazek. He will then describe the conditions of the exhibits.

Miss Sandra Mrazek, from the RCMP Crime Laboratory, will explain her examination of the two exhibits and also of a piece of Kleenex given to her as an exhibit.

Constable John Mullowney, a member of the Sydney Police Force, will testify that he searched the Crescent Street area after the alleged offence and found the blood soaked piece of Kleenex in the area.

Sgt. John MacIntyre, a member of the Sydney Police Force, may be called regarding statements made by the accused.

Law Involved:
Section 206(2)
Section 203.

Dated at:
Sydney, Nova Scotia, this 12th day of October, A.D., 1971.

(signed)

Donald C. MacNeil
Prosecuting Officer,
Cape Breton County

(iii) Directive of July 18, 1988

From: Hon. Terence R. B. Donahoe, Q.C. Attorney General
To: Prosecuting Officers and Assistant Prosecuting Officers
Subject: Summaries for Supreme Court Trial Judges
Date: April 15, 1983

Henceforth, you are requested to provide the defence with a copy of any summary which you prepare and submit to a Supreme Court Trial Judge in advance of the trial.

23
Manitoba Guideline Concerning Special Prosecutions Branch

February 5, 1981

Date Effective: February 5, 1981
Subject: Special Prosecutions Branch

The writer would now like to outline those class of cases that the Special Prosecutions Branch will handle:

Class 1
Significant cases involving commercial or corporate criminal conduct of a complex nature, i.e. fraud, conspiracy to commit fraud, theft, etc.

Class 2
Cases which because of their protracted nature would have a significance outside the general stream of criminal prosecutions. Example, arson - fraud, gambling and related wiretap evidence.

Class 3
Cases which because of a subject matter under investigation are particularly sensitive in nature and require more protracted attention. Such sensitivity would involve the investigation and prosecution of members of the government, peace officers, members of the judiciary, public officials, where alleged acts occurred during the course of employment.

Class 4
Cases involving organized criminal activity with inter-provincial or international implications.

Class 5
Cases which are more appropriately handled by a Crown Prosecutor out of the particular judicial district.

Procedures

I feel I should now outline to you the manner in which your investigative officers should bring to the attention of the Special Prosecutions Branch, cases that could possibly fall within the enumerated classes.

The history of our Department has been that a police officer will attend upon the Crown Attorney in the Judicial area involved and request instructions from him as to whether or not charges should be preferred and what these charges would entail.

I would suggest that in the future all communications dealing with the above-noted topics should be made directly to the Special Prosecutions Branch. I would further suggest that if the communication is in fact, a first communication dealing with the file, that same be made directly to my office, with one exception. With respect to the City of Winnipeg Police Department, all first communications dealing with a case involved in the above-noted topics, with the exception of Class 1, should be made directly to the Senior Crown Attorney for Provincial Judges' Court at the City of Winnipeg. The Senior Crown and I have set up a system of liaison in which cases that he feels may come within the classes set out herein are discussed and decisions made as to whether or not those cases would be forwarded directly to the Special Prosecutions Branch. Once a file has been turned over to the Special Prosecutions Branch, it is no longer necessary for those officers of the City of Winnipeg Police Department to deal with that Senior Crown but can then deal directly with members of the Branch.

Requests for prosecutorial assistance from prosecutors outside the Special Prosecutions Branch in whatever Judicial District, should be made directly to the writer.

I do want to emphasize that the Special Prosecutions Branch is not to be considered the exclusive prosecutor with respect to offences such as Conspiracy, Arson, Betting, etc., but only those cases that come within the classes set out in this correspondence. Should there be any question as to whether or not the matter should be referred to our Branch, then I would suggest that you contact the writer directly or if I'm not available, Mr. Schachter or Mr. Mellon. This, of course, would not apply to the City of Winnipeg Police Department, who should make such contact directly with the Senior Crown Attorney.

When you have prepared instructions to those divisions of your Police Department which are likely to be dealing with cases within the purview of the Special Prosecutions Branch, I would appreciate receiving a copy of those instructions as they are available.

24
Survey Results

(i) Questionnaire to Prosecuting Officers

1.

(a) How long have you been working for the Attorney General? (%)

- Less than 1 year: *2.4*
- Between 1 and 5 years: *26.2*
- Between 5 and 10 years: *52.4*
- Between 10 and 15 years: *16.7*
- Between 15 and 20 years: *0*
- More than 20 years: *2.4*

(b) Did you have experience in the practice of law prior to working for the Attorney General's Department? (%)

- Yes: *87.8*
- No: *12.2*

Please specify in general terms (*i.e.* private practice, government service, etc.) (%)

- Private Practice: *79.5*
- Government: *2.6*
- Legal Aid: *2.*
- Priv./Judiciary: *2.6*
- Priv./Government Combined: *12.8*

2.

What is your present position? (%)

- Prosecuting Officer: *8.6*
- Assistant Prosecuting: Officer *44.2*
- Per diem Prosecuting: Officer *37.3*

3.

(a) How long have you held this position? (%)

- Less than 1 year: *2.45*
- Between 1 and 5 years: *26.8*
- Between 5 and 10 years: *48.8*
- Between 10 and 15 years: *22.0*
- Between 15 and 20 years: *0*
- More than 20 years: *0*

(b) Do you consider this position a: (%)

- Career position? *68.3*
- Interim position? *24.4*
- Both: *7.3*

(c) What other career goals, if any, do you have in mind? (%)

- Private Goals: *38.1*
- Judiciary: *19.0*
- (Promotion) Advance in A.G.'s Office: *19.0*
- Other law related: *14.3*
- Not law related: *9.5*
- Undecided: *0*

4.

(a) How long have you been prosecuting offences for the Attorney General of Nova Scotia? (%)

- 1 to 4 years: *31.0*
- 5 to 10 years: *38.1*
- Over 10 years: *31.0*

(b) Approximately how many hours per month do you spend in court prosecuting offences for the Attorney General? (%)

- 1 to 10 hours: *22*
- 11 to 20 hours: *12.2*
- 21 to 30 hours: *2.4*
- 31 to 40 hours: *34.1*
- 41 to 50 hours: *4.9*
- 51 to 75 hours: *14.6*
- 76 + hours: *9.8*

5.

(a) From what institution did you receive your initial law degree (LL.B.)? (%)

- Dalhousie: *88.4*
- Other (please specify): *11.6*

(b) Do you have an LL.M.? (%)

- Yes: *9.5*
- No: *90.5*

(c) Have you taken advantage of any of the following continuing legal education programs during your career as a Crown prosecutor?

(i) The Federation of Law Societies Criminal Law Refresher: (%)

- Always: *0*
- Frequently: *4.9*
- Sometimes: *17.1*
- Rarely: *14.6*
- Never: *63.4*

(ii) C.L.E. Conferences: (%)

- Always: *0*
- Frequently: *23.3*
- Sometimes: *32.6*
- Rarely: *23.3*
- Never: *20.9*

(iii) The Attorney General's Department Fall Meeting for Prosecuting Officers: (%)

- Always: *62.8*
- Frequently: *2.3*
- Sometimes: *7.0*
- Rarely: *14.0*
- Never: *14.0*

(vi) Others: *(Please specify)*

6.

(a) What was the nature of your initial appointment? (%)

- Civil Service Appointment: *12.2*
- Appointment by Order in Council: *87.8*

(b) If your initial appointment was made by the Civil Service Commission:

(i) Was the position advertised? (%)

- Yes: *28.6*
- No: *71.4*

(ii) Was a competition held? (%)

- Yes: *62.5*
- No: *37.5*

(iii) Were you interviewed? (%)

- Yes: *77.8*
- No: *22.2*

(c) If your initial appointment was by Order in Council:

(i) Has it been converted to a Civil Service position? (%)

- Yes: *14.7*
- No: *85.3*

(ii) If so, how many years after your original appointment did this conversion take place?

(iii) Explain why you were appointed by Order in Council rather than by the Civil Service Commission.

7.
How often have you appeared for the Crown before the following courts:

(a) Provincial Court: (%)

- Always: *23.3*
- Frequently: *69.8*
- Sometimes: *4.7*
- Rarely: *2.3*
- Never: *0*

(b) County Court: (%)

- Always: *9.5*
- Frequently: *35.7*
- Sometimes: *28.6*
- Rarely: *16.7*
- Never: *9.5*

(c) Supreme Court Trial Division: (%)

- Always: *4.7*
- Frequently: *32.6*
- Sometimes: *27.9*
- Rarely: *18.6*
- Never: *16.3*

(d) Supreme Court Appeal Division: (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *0*
- Rarely: *25.6*
- Never: *74.4*

(e) Supreme Court of Canada: (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *0*
- Rarely: *4.8*
- Never: *95.2*

8.

(a) Who usually assigns you to a particular court or level of court?

- Answer: *Chief Prosecuting Officer of County*

(b) What considerations do you feel are used in making these decisions?

(c) Are you consulted? (%)

- Always: *29.0*
- Frequently: *19.4*
- Sometimes: *35.5*
- Rarely: *12.9*
- Never: *3.2*

(d) Comment on the positive and/or negative aspects of appearing before the same judge for a prolonged period of time.

- Answer:
- Positive: *Know what to expect/what is required. Procedure of disposition and sentencing is more predictable.*
- Negative: *Crown may hesitate to object or appeal; too complacent; Judge may use personal relationship to consult privately.*

9.

What is the population of the jurisdiction in which you most frequently prosecute?

	Prosecution:(%)	**Defence:(%)**
• Under 10,000	*2.5*	*2.0*
• Between 10,000 and 19,999	*25.0*	*18.4*
• Between 20,000 and 29,999	*7.5*	*4.1*
• Between 30,000 and 39,999	*17.5*	*14.3*
• Between 40,000 and 99,999	*25.0*	*14.3*
• Between 100,000 and 199,999	*10.0*	*22.4*
• Over 200,000	*12.5*	*24.5*

10.

With which police force(s) would you normally have contact concerning the prosecution of offences?

(a) RCMP (%)

- Always: *27.9*
- Frequently: *46.5*
- Sometimes: *23.3*
- Rarely: *2.3*
- Never: *0*

(b) Municipal: (%)

- Always: *20.0*
- Frequently: *55.0*
- Sometimes: *15.0*
- Rarely: *5.0*
- Never: *5.0*

(c) Other: (%) *(Please specify)*

- Always: *0*
- Frequently: *13.0*
- Sometimes: *39.1*
- Rarely:*34.8*
- Never: *13.0*

11.

How large is the local police force/detachment with which you most often have contact?

- Answers: *Range from 1 to 400*

12.

(a) How often do the police initiate contact with you regarding the investigation of a particular offence prior to the laying of an information? (%)

- Always: *0*
- Frequently: *32.6*
- Sometimes: *34.9*
- Rarely: *25.6*
- Never: *7.0*

(b) Explain the nature and purposes of such contacts:

- Answer: *To determine if evidence supports a particular charge; to determine which charge to lay.*

(c) Who are the officers who make this contact: *i.e.*, constables, detectives, Superintendent, Chief, etc.?

- Answer: *Constables*

(d) Have you ever disagreed with a police officer's decision to lay a charge or not to lay a charge? (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *48.8*
- Rarely: *34.1*
- Never: *17.1*

(e) If your answer is other than "Never", please describe circumstances and the manner of resolution of the disagreement.

- Answer: *Most said that they had final decision (see Comment Summaries)*

(f) In your opinion, should a police officer be given the exclusive right to decide whether or not to lay an information?(%)

- Yes: *7.3*
- No: *92.7*

(g) *(Please explain:)*

- Answer:
- Yes: *Check on power of the Crown; Police should lay and Crown can withdraw in open court.*
- No: *Police don't know legal or evidentiary problems or requirement.*

13.

(a) How often do you initiate contact with local police concerning general policies of law enforcement and the prosecution of offences? (%)

- Always: *0*
- Frequently: *11.9*
- Sometimes: *35.7*
- Rarely: *21.4*
- Never: *31.0*

(b) Can you cite some examples of this kind of contact?

14.

(a) How often do you request the police to make investigations which might lead to the laying of criminal charges? (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *32.6*
- Rarely: *41.9*
- Never: *25.6*

(b) If you have made this type of request:

(i) What was the source of the information which led you to believe that the investigation was necessary?

- Answer: *Phone calls; perjury in court.*

(ii) Have you ever personally investigated the possible commission of an offence?(%)

- Yes: *15.8*
- No: *78.9*

15.

(a) How often do you ask the police to make further investigations in preparation for trial after the laying of an information? (%)

- Always: *0*
- Frequently: *20.9*
- Sometimes: *51.2*
- Rarely: *20.9*
- Never: *7.0*

(b) If you have asked the police to make further investigations in preparation for trial, *(please give specific examples.)*

- Answer: *Ask to find additional witnesses; particulars about scene of crime; information to rebut possible defences.*

16.

When making requests to the police for further investigations, who in the police force would you normally contact, i.e. constables, detectives, Superintendent, Chief, etc.?

- Answer: *Constables/investigators*

17.

(a) How often do you advise the police in the drafting of informations? (%)

- Always: *2.4*
- Frequently: *26.2*
- Sometimes: *42.9*
- Rarely: *23.8*
- Never: *4.8*

(b) How often are you required to actually draft an information for the police? (%)

- Always: *2.4*
- Frequently: *4.8*
- Sometimes: *40.5*
- Rarely: *40.5*
- Never: *11.9*

(c) Under what circumstances would this occur?

- Answer: *Complicated charge (fraud)*

(d) Do you feel Prosecuting Officers should be regularly involved in drafting informations?(%)

- Yes: *61.5*
- No: *35.9*
- Depends: *2.6*

Please explain:

18.

What factors do you take into account in determining whether a charge should or should not be laid?

- Answer: *Sufficient evidence; seriousness of offence; attitude of defendant; quality of witnesses.*

19.

(a) In preparation for trial, how often are you given complete access to the entire police file? (%)

- Always: *55.0*
- Frequently: *25.0*
- Sometimes: *12.5*
- Rarely: *5.0*
- Never: *2.5*

(b) In your opinion, under what circumstances would the police withhold information? *(Explain):*

- Answer: *Don't withhold; may fear that defence counsel will obtain from prosecutor.*

(c) Are there any procedures in effect which would allow a Prosecuting Officer to be sure he or she had access to all information collected by the police in the course of investigating a particular offence?(%)

- Yes: *23.1*
- No: *74.4*
- Depends: *2.6*

(d) If there are, please explain:

(e) How often are you left with the impression that the police investigation is not satisfactory? (%)

- Always: *0*
- Frequently: *7.0*
- Sometimes: *51.2*
- Rarely: *41.9*
- Never: *0*

20.

(a) How often do you go to trial relying only on witness statements provided by the police without personally interviewing witnesses? (%)

- Always: *9.3*
- Frequently: *27.9*
- Sometimes: *37.2*
- Rarely: *41.9*
- Never: *4.7*

(b) Under what circumstances and/or in relation to what offences would you do this?

- Answer: *Minor matters (summary convictions); motor vehicle offences.*

21.

(a) How often do you interview witnesses prior to the day of trial? (%)

- Always: *0*
- Frequently: *26.2*
- Sometimes: *45.2*
- Rarely: *23.8*
- Never: *4.8*

(b) Under what circumstances and/or in relation to what offences?

- Answer: *Serious or more complicated cases.*

22.

Do you make disclosure to defence counsel?(%)

- Automatically: *35.7*
- Only upon request: *54.8*

	Prosecutor: (%)	Defence: (%)
• Always:	*7.8*	*41.7*
• Frequently:	*9.8*	*45.8*
• Sometimes:	*23.5*	*10.4*
• Rarely:	*29.4*	*2.1*
• Never:	*29.4*	*0*

23.

(a) How often do you give unrestricted access to defence counsel of your complete file in a case?

	Prosecutor: (%)	Defence: (%)
• Always:	*27.9*	*15.7*
• Frequently:	*44.2*	*39.2*
• Sometimes:	*9.3*	*21.6*
• Rarely:	*7.0*	*11.8*
• Never:	*11.6*	*11.8*

(b) How often do you make the following available to defence counsel?

(i) Crown sheets:

	Prosecutor: (%)	Defence: (%)
• Always:	*74.4*	*78.4*
• Frequently:	*23.3*	*11.8*
• Sometimes:	*2.3*	*7.8*
• Rarely:	*0*	*2.0*
• Never:	*1*	*0*

(ii) All statements made by the accused:

	Prosecutor: (%)	Defence: (%)
• Always:	*90.7*	*64.7*
• Frequently:	*7.0*	*29.4*
• Sometimes:	*2.3*	*5.9*
• Rarely:	*0*	*0*
• Never:	*0*	*0*

(iii) All statements made by witnesses:

	Prosecutor: (%)	Defence: (%)
• Always:	*58.1*	*23.5*
• Frequently:	*30.2*	*29.4*
• Sometimes:	*9.3*	*39.2*
• Rarely:	*0*	*7.8*
• Never:	*2.3*	*0*

(iv) Names of persons who may have evidence whom the Crown intends not to call:

	Prosecutor: (%)	Defence: (%)
• Always:	*47.6*	*8.0*
• Frequently:	*26.2*	*10.0*
• Sometimes:	*9.5*	*16.0*
• Rarely:	*14.3*	*46.0*
• Never:	*2.4*	*20.0*

(v) Police reports:

	Prosecutor: (%)	Defence: (%)
• Always:	*28.6*	*11.8*
• Frequently:	*38.1*	*23.5*
• Sometimes:	*16.7*	*27.5*
• Rarely:	*14.3*	*23.5*
• Never:	*2.4*	*13.7*

(vi) Other: *(Please specify)*

24.

(a) How often do you impose conditions on the way information disclosed to defence counsel may be used?

	Prosecutor: (%)	Defence: (%)
• Always:	*2.4*	*27.5*
• Frequently:	*7.1*	*13.7*
• Sometimes:	*21.4*	*19.6*
• Rarely:	*38.1*	*29.4*
• Never:	*31.0*	*9.8*

(b) Why would these conditions be imposed?

(i) to protect witnesses:

	Prosecutor: (%)	**Defence: (%)**
• Always:	*20.0*	*10.9*
• Frequently:	*34.3*	*26.1*
• Sometimes:	*17.1*	*34.8*
• Rarely:	*22.9*	*19.6*
• Never:	*5.7*	*8.7*

(ii) to protect victims: (%)

- Always: *20.0*
- Frequently: *34.3*
- Sometimes: *22.9*
- Rarely: *17.1*
- Never: *5.7*

(iii) to prevent the loss of physical evidence:

	Prosecutor: (%)	**Defence: (%)**
• Always:	*11.4*	*2.3*
• Frequently:	*8.6*	*2.3*
• Sometimes:	*31.4*	*23.3*
• Rarely:	*40.0*	*37.2*
• Never:	*8.6*	*34.9*

(iv) because of a bad prior experience with a particular defence counsel:

	Prosecutor: (%)	**Defence: %)**
• Always:	*2.9*	*4.7*
• Frequently:	*8.8*	*18.6*
• Sometimes:	*23.5*	*23.3*
• Rarely:	*35.3*	*27.9*
• Never:	*29.4*	*25.6*

(v) because the investigating officer has expressed personal opinions in some of the documents in the file:

	Prosecutor: (%)	**Defence: (%)**
• Always:	*0*	*2.3*
• Frequently:	*0*	*9.3*
• Sometimes:	*48.6*	*44.2*
• Rarely:	*28.6*	*27.9*
• Never:	*22.9*	*16.3*

(vi) Other:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*5.9*
• Frequently:	*50.0*	*41.2*
• Sometimes:	*50.0*	*29.4*
• Rarely:	*0*	*5.9*
• Never:	*0*	*17.6*

25.

(a) How much evidence do you usually call when conducting a preliminary inquiry?

(i) only enough evidence to get a committal for trial:

	Prosecutor: (%)	Defence: (%)
• Always:	*14.3*	*10.2*
• Frequently:	*40.5*	*53.1*
• Sometimes:	*33.3*	*28.6*
• Rarely:	*9.5*	*8.2*
• Never:	*2.4*	*0*

(ii) all witnesses known to the Crown likely to be called at trial:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*17.5*	*30.6*
• Sometimes:	*30.0*	*20.4*
• Rarely:	*42.5*	*34.7*
• Never:	*10.0*	*14.3*

(b) What considerations govern your decisions on these issues? *(Explain)*

• Answer: *Nature of offence; strength of witnesses.*

26.

(a) How often have you had occasion to withdraw all charges or enter a stay on all charges against an accused? (%)

• Always: *0*
• Frequently: *0*
• Sometimes: *27.9*
• Rarely: *67.4*
• Never: *4.7*

(b) Under what circumstances have you done this?

• Answer: ***Insufficient evidence; unavailable witness; new evidence tends to show accused didn't commit.***

27.

(a) How often are guilty pleas the product of plea negotiation?

	Prosecutor: (%)	**Defence: (%)**
• Always:	*2.3*	*0*
• Frequently:	*37.2*	*56.9*
• Sometimes:	*44.2*	*39.2*
• Rarely:	*11.6*	*3.9*
• Never:	*4.7*	*0*

(b) Can you estimate in percentage terms?

28.

(a) How often do you initiate plea negotiations?

	Prosecutor: (%)	**Defence: (%)**
• Always:	*0*	*0*
• Frequently:	*2.3*	*5.9*
• Sometimes:	*30.2*	*25.5*
• Rarely:	*44.2*	*64.7*
• Never:	*23.3*	*3.9*

(b) How often have the following factors led you to agree to a negotiated plea?

(i) uncertainty about the availability of sufficient proof to sustain a conviction:

	Prosecutor: (%)	**Defence: (%)**
• Always:	*0*	*6.0*
• Frequently:	*14.3*	*30.0*
• Sometimes:	*40.5*	*50.0*
• Rarely:	*23.8*	*12.0*
• Never:	*21.4*	*2.0*

(ii) to prevent a backlog in case load on the court docket:

	Prosecutor: (%)	**Defence: (%)**
• Always:	*0*	*0*
• Frequently:	*0*	*10.0*
• Sometimes:	*21.4*	*28.0*
• Rarely:	*31.0*	*42.0*
• Never:	*47.6*	*20.0*

(iii) gain the accused's cooperation in the prosecution of others:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*0*	*6.0*
• Sometimes:	*11.6*	*46.0*
• Rarely:	*34.9*	*38.0*
• Never:	*53.5*	*10.0*

(iv) a consideration of the interests of the victim:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*14.0*	*4.0*
• Sometimes:	*58.1*	*66.0*
• Rarely:	*23.3*	*24.0*
• Never:	*4.7*	*6.0*

(v) a recommendation of a departmental superior:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*2.3*	*0*
• Sometimes:	*2.3*	*17.0*
• Rarely:	*37.2*	*55.3*
• Never:	*58.1*	*27.7*

(vi) Other: *(Explain)*

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*0*	*42.9*
• Sometimes:	*16.7*	*21.4*
• Rarely:	*50.0*	*0*
• Never:	*33.3*	*35.7*

(Many charges; no greater penalty can be expected.)

29.

(a) How often are plea negotiations initiated by defence counsel?

	Prosecutor: (%)	Defence: (%)
• Always:	*11.9*	*8.0*
• Frequently:	*64.3*	*60.0*
• Sometimes:	*23.8*	*26.0*
• Rarely:	*0*	*6.0*
• Never:	*0*	*0*

(b) What factors, in your perception, motivate defence counsel in such negotiations?

(i) to minimize the length and severity of the accused's sentence:

	Prosecutor: (%)	Defence: (%)
• Always:	*11.9*	*11.8*
• Frequently:	*50.0*	*68.6*
• Sometimes:	*33.3*	*17.6*
• Rarely:	*4.8*	*2.0*
• Never:	*0*	*0*

(ii) to permit the accused to avoid the public disgrace of a trial:

	Prosecutor: (%)	Defence: (%)
• Always:	*2.4*	*0*
• Frequently:	*12.2*	*9.8*
• Sometimes:	*51.2*	*25.5*
• Rarely:	*26.8*	*52.9*
• Never:	*7.3*	*11.8*

(iii) to obtain for the accused a faster and less expensive procedure:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*4.0*
• Frequently:	*22.5*	*14.0*
• Sometimes:	*40.0*	*24.0*
• Rarely:	*27.5*	*40.0*
• Never:	*10.0*	*18.0*

(iv) to quickly dispose of an unwanted, unprofitable or difficult case:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*7.5*	*0*
• Sometimes:	*32.5*	*7.8*
• Rarely:	*47.5*	*21.6*
• Never:	*12.5*	*70.6*

(v) Other:(%)

- Always: *0*
- Frequently: *25.0*
- Sometimes: *50.0*
- Rarely: *25.0*
- Never: *0*

Explain:

30.

(a) Which of the following are offered (or are sought by defence counsel) in return for a plea of guilty?

(i) a reduction in the charge to a lesser or included offence:

	Prosecutor: (%)	**Defence: (%)**
• Depends:	*2.3*	*0*
• Always:	*0*	*0*
• Frequently:	*30.2*	*47.1*
• Sometimes:	*58.1*	*43.1*
• Rarely:	*9.3*	*7.8*
• Never:	*0*	*2.0*

(ii) a withdrawal of other charges:

	Prosecutor: (%)	**Defence: (%)**
• Always:	*0*	*0*
• Frequently:	*44.2*	*62.7*
• Sometimes:	*53.5*	*37.3*
• Rarely:	*0*	*0*
• Never:	*2.3*	*0*

(iii) a favourable recommendation as to the severity of the sentence:

	Prosecutor: (%)	**Defence: (%)**
• Depends:	*2.3*	*0*
• Always:	*0*	*3.9*
• Frequently:	*37.2*	*54.9*
• Sometimes:	*51.2*	*29.4*
• Rarely:	*7.0*	*7.8*
• Never:	*2.3*	*3.9*

(iv) use of summary conviction procedure rather than proceeding by way of indictment:

	Prosecutor: (%)	**Defence: (%)**
• Always:	*0*	*2.0*
• Frequently:	*9.3*	*17.6*
• Sometimes:	*53.5*	*51.0*
• Rarely:	*30.2*	*27.5*
• Never:	*7.0*	*2.0*

(v) a promise not to oppose release on bail or release after conviction but before sentence:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*0*	*3.9*
• Sometimes:	*16.3*	*13.7*
• Rarely:	*62.8*	*47.1*
• Never:	*20.9*	*35.3*

(vi) a promise not to apply for a harsher penalty in accordance with s. 592 of the *Criminal Code* where the accused has a previous conviction for the same offence:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*0*	*3.9*
• Sometimes:	*30.2*	*39.2*
• Rarely:	*39.5*	*47.1*
• Never:	*30.2*	*37.3*

(vii) a promise not to force a jury trial under s. 498 of the *Criminal Code:*

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*0*	*0*
• Sometimes:	*7.0*	*0*
• Rarely:	*27.9*	*15.7*
• Never:	*65.1*	*84.3*

(viii) a promise not to charge friends or family of the accused:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*0*	*2.0*
• Sometimes:	*7.1*	*17.6*
• Rarely:	*38.1*	*33.3*
• Never:	*54.8*	*47.1*

(ix) a promise or a recommendation as to the type of treatment, the place of imprisonment, or the time of parole:

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*0*	*9.8*
• Sometimes:	*28.6*	*29.4*
• Rarely:	*45.2*	*35.3*
• Never:	*26.2*	*25.5*

(x) Others? *(Explain)*

31.

How often might you discuss a plea negotiation with any of the following people:

(a) an Assistant Prosecuting Officer:(%)

- Always: *0*
- Frequently: *7.9*
- Sometimes: *42.1*
- Rarely: *23.7*
- Never: *26.3*

(b) a Prosecuting Officer:(%)

- Always: *7.5*
- Frequently: *12.5*
- Sometimes: *40.0*
- Rarely: *25.0*
- Never: *15.0*

(c) the Director Prosecutions:(%)

- Always: *0*
- Frequently: *2.3*
- Sometimes: *18.6*
- Rarely: *44.2*
- Never: *34.9*

(d) the Director Criminal:(%)

- Always: *0*
- Frequently: *0*
- Sometimes: *11.9*
- Rarely: *38.1*
- Never: *50.0*

(e) the Deputy Attorney General:(%)

- Always: *0*
- Frequently: *0*
- Sometimes: *0*
- Rarely: *11.9*
- Never: *88.1*

(f) the Attorney General:(%)

- Always: *0*
- Frequently: *0*
- Sometimes: *0*
- Rarely: *4.7*
- Never: *95.3*

(g) Other: (%)

- Always: *40.0*
- Frequently: *20.0*
- Sometimes: *20.0*
- Rarely: *0*
- Never: *20.0*

32.

How often would you seek advice concerning any of the following issues:

(a) Pretrial detention or conditions of interim release: (%)

- Always: *4.8*
- Frequently: *16.7*
- Sometimes: *26.3*
- Rarely: *28.6*
- Never: *23.8*

(i) If 2, 3 or 4 under what circumstances would you seek advice?

- Answer: *Depends on the nature of the crime.*

(ii) Who would you most likely contact?

(b) Withdrawing charges: (%)

- Always: *21.4*
- Frequently: *21.4*
- Sometimes: *38.1*
- Rarely: *16.7*
- Never: *2.4*

(i) If 2, 3 or 4 under what circumstances would you seek advice?

(ii) Who would you most likely contact?

- Answer: *Director of Criminal; Prosecutor*

(c) Stays of proceedings: (%)

- Always: *35 0*
- Frequently: *7.5*
- Sometimes: *15.0*
- Rarely: *27.5*
- Never: *15.0*

(i) If 2, 3 or 4 under what circumstances would you seek advice?

- Answer: One questionnaire stated: When high public profile cases. Another said that couldn't stay without Director of Criminal's O.K.

(ii) Who would you most likely contact?

.....

(d) Choice among multiple charges: (%)

- Always: *7.1*
- Frequently: *9.5*
- Sometimes: *33.3*
- Rarely: *16.7*
- Never: *33.3*

(i) If 2, 3 or 4 under what circumstances would you seek advice?

.....

(ii) Who would you most likely contact?

.....

(e) Sentencing recommendations: (%)

- Always: *10.0*
- Frequently: *2.5*
- Sometimes: *42.5*
- Rarely: *25.0*
- Never: *20.0*

(i) If 2, 3 or 4 under what circumstances would you seek advice?

.....

(ii) Who would you most likely contact?

.....

(f) Give examples of other issues on which you have sought advice and whom you asked for this advice:

.....

33.

(a) How often are pre-sentence reports made available for use in sentencing offenders?

	Prosecutor: (%)	**Defence: (%)**
• Depends:	*0*	*2.0*
• Always:	*7.0*	*25.5*
• Frequently:	*79.1*	*58.8*
• Sometimes:	*14.0*	*11.8*
• Rarely:	*0*	*0*
• Never:	*0*	*2.0*

(b) In making submissions on sentencing, how often are you guided by the information found in pre-sentence reports?

	Prosecutor: (%)	**Defence: (%)**
• Always:	*7.0*	*7.8*
• Frequently:	*51.2*	*62.7*
• Sometimes:	*37.2*	*25.5*
• Rarely:	*4.7*	*2.0*
• Never:	*0*	*2.0*

34.

(a) How often has your conduct of a prosecution been altered by a particular direction or instruction from a departmental "superior"? (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *2.3*
- Rarely: *39.5*
- Never: *58.1*

(b) Who has given these directions, and under what circumstances?

- Answer: *Department Superiors suggested a charge be withdrawn but left final decision to prosecutor. (See Summary - Gordon Gale made a direction to stay proceeding.)*

(c) Have you ever been required to turn the prosecution of a case over to another prosecutor? (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *9.3*
- Rarely: *18.6*
- Never: *72.1*

Under what circumstances? (Please specify)

35.

(a) What influence do you have over whether and how a case which you have prosecuted will be taken on appeal by the Crown?

• Answer: *Very little. Make recommendations.*

(b) Do you view this state of affairs as satisfactory? *(Please explain.)*

• Answer: *Yes: Senior solicitors can have a more objective view. Most often my recommendation is accepted therefore feel is satisfactory. No: Should have greater input. Prosecutor has better knowledge of the case.*

36.

Do you consider the directions in the loose-leaf volume *Advice to Prosecuting Officers* to be mandatory instructions?(%)

• Yes: *63.9*
• No: *36.1*

(Please explain:)

• Yes: *Do not deviate without consulting superiors. Department policy which I follow for consistency.*
• No: *Guidelines only. Words used are imprecise.*

37.

(a) Do you receive other general instructions which are not included in the volume entitled *Advice to Prosecuting Officers?*(%)

• Yes: *51.3*
• No: *48.7*

(b) Who would issue these instructions?

• Answer: *Director of Criminal; Chief Prosecutor.*

(c) What form would these instructions take?

• Answer: *Policy statements; letters; memos; phone calls.*

38.

Are there any other factors which affect the way in which you exercise your prosecutorial discretion or carry out your duties?

• Answer: *Yes, police interference, the problem is chronic and out of control. Common sense.*

39.

(a) Is your performance as a Prosecuting Officer evaluated by the Attorney General's Department?(%)

- Yes: *42.4*
- No: *57.6*

(b) If yes, what evaluation process is used?

- Answer: *Many are unsure of the existence of any formal evaluation system. Some say one was in place but hasn't been used for several years.*

(c) Is this state of affairs appropriate in your view?(%)

- Yes: *60.0*
- No: *36.0*
- Depends: *4.0*

(Explain)

- Positive: *Seem to be satisfied; best possible way to allow superiors to give opinion.*
- Negative: *No feedback, salaries and promotion not tied to performance; don't weed out poor performers.*

40.

(a) Are you given an opportunity to provide in-put in relation to departmental policy covering the way you exercise prosecutorial discretion or carry out your duties?(%)

- Yes: *35.0*
- No: *65.0*

(b) Please comment:

41.

(a) How would you describe your morale in relation to your work? (%)

- Positive: *74.4*
- Indifferent/Neutral: *18.6*
- Negative: *7.0*

(b) How would you describe the morale of prosecutors in general? (%)

- Positive: *53.8*
- Indifferent/Neutral: *20.5*
- Negative: *20.5*

(c) Please explain the reasons for your response.

- Positive: *interesting work; autonomy.*
- Negative: *poor pay; bad work conditions; overworked; lack of research facilities; little chance of advancement.*

(d) What is your yearly income from prosecuting offences? **($)**

(e) (i) Do you consider this adequate?(%)

- Yes: *29.3*
- No: *70.7*

(ii) Please comment:

- Answer: *Underpaid when consider income opportunities in private practice or amount of work put in.*

(f) (i) Are the research facilities available to you adequate?(%)

- Yes: 64.3
- No: 35.7

(ii) Please comment:

(g) (i) Do you consider working conditions in your jurisdiction adequate?(%)

- Yes: *68.3*
- No: *29.3*
- Depends: *2.4*

(ii) Please comment:

42.

(a) Have you had occasion to prepare *Summaries for Trial Judges*?

	Prosecutor: (%)
• Always:	*4.8*
• Frequently:	*19.0*
• Sometimes:	*40.5*
• Rarely:	*16.7*
• Never:	*19.0*

(b) Please comment on the value of these summaries:

- Answer: *Most felt summaries were useful and had no objection to their use.*

(c) If you have prepared such summaries, how often have you made them available to defence counsel?

	Prosecutor: (%)	Defence: (%)
• Depends:	*0*	*2.4*
• Always:	*52.9*	*19.0*
• Frequently:	*11.8*	*7.1*
• Sometimes:	*11.8*	*11.9*
• Rarely:	*8.8*	*11.9*
• Never:	*14.7*	*47.6*

43.

(a) How often have you participated in pre-trial conferences in criminal matters?

	Prosecutor: (%)	Defence: (%)
• Depends:	*0*	*8.2*
• Always:	*11.9*	*6.1*
• Frequently:	*14.3*	*10.2*
• Sometimes:	*31.0*	*24.5*
• Rarely:	*31.0*	*30.6*
• Never:	*11.9*	*20.4*

(b) What issues are most often discussed in pre-trial conferences?

(c) Please comment on the value of pre-trial conferences.

• Answer: *Valuable especially in complex cases.*

44.

(a) In your experience, how often do pre-trial conferences have an impact on plea negotiation?

	Prosecutor: (%)	Defence: (%)
• Always:	*0*	*0*
• Frequently:	*5.4*	*9.3*
• Sometimes:	*16.2*	*20.9*
• Rarely:	*37.8*	*46.5*
• Never:	*40.5*	*23.3*

(b) Please give examples:

• Answer: *Sometimes judge will imply whether a party has a strong case. Most say no effect.*

45.

(a) Does your conduct of a prosecution differ according to whether an accused is represented or unrepresented by counsel? (%)

- Always: *9.5*
- Frequently: *7.1*
- Sometimes: *21.4*
- Rarely: *16.7*
- Never: *45.2*

(b) Please explain:

- Answer: *Some say they try to make sure the accused understands the process.*

46.

(a) Does your conduct of a prosecution differ in relation to what you perceive to be the degree of competence or incompetence of defence counsel? (%)

- Always: *2.3*
- Frequently: *2.3*
- Sometimes: *27.9*
- Rarely: *23.3*
- Never: *44.2*

(b) Please explain:

47.

(a) Are there written or unwritten understandings with the Attorney General's Department concerning the prosecution of "public figures" or controversial cases?(%)

- Yes: *5.0*
- No: *92.5*
- Depends: *2.5*

If yes, please explain:

- Most common answer: *"Not to my knowledge". Notify department; send to superior.*

(b) Do you think there ought to be a "special prosecutions" unit in the Attorney General's Department which would prosecute particularly complex or sensitive cases?

	Prosecutor: (%)	Defence: (%)
• Yes:	*57.5*	*60.4*
• No:	*42.5*	*33.3*
• Depends:	*0*	*6.3*

(c) If your answer to (b) was yes, state briefly your reasons why such a unit would be valuable and what kinds of offences it might handle.

• Answer: *Remove political influence. Complex or sensitive cases could be handled better.*

(d) If your answer to (b) was no, state why you think a special prosecutions unit is not advisable.

• Answer: *Appearance of bias. All accused should be treated equally.*

48.

Have you ever encountered instances of judicial efforts to control or influence the manner in which you exercise your prosecutorial discretion? (%)

• Always: *0*
• Frequently: *2.4*
• Sometimes: *16.7*
• Rarely: *26.2*
• Never: *54.8*

Please provide examples, if any:

• Answer: *Some judges try to intimidate you into doing what they want.*

49.

(a) Do you have social contact outside the courtroom with any of the members of the judiciary before whom you may be required to appear? (%)

• Always: *0*
• Frequently: *2.4*
• Sometimes: *26.2*
• Rarely: *57.1*
• Never: *14.3*

(b) If you have such contact, please describe typical circumstances:

• Answer: *Bench/Bar functions; community events.*

50.

(a) Do you ever have occasion to discuss outside the courtroom a particular case with the judge before whom the matter is being heard? (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *12.2*
- Rarely: *12.2*
- Never: *75.6*

(b) If yes, please describe the circumstances:

- Answer: *Sometimes after a matter is dealt with.*

(c) How often, in your opinion, do other prosecutors discuss particular cases with judges outside of the courtroom? (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *12.1*
- Rarely: *48.5*
- Never: *39.4*

51.

(a) In matters heard in the following courts, how often do you feel that judges have read the transcript of the preliminary inquiry?

(i) Judges of the County Court?

	Prosecutor: (%)	**Defence: (%)**
• Depends:	*0*	*2.3*
• Always:	*19.4*	*2.3*
• Frequently:	*41.7*	*36.4*
• Sometimes:	*22.2*	*25.0*
• Rarely:	*13.9*	*22.7*
• Never:	*2.8*	*11.4*

(ii) Judges of the Nova Scotia Supreme Court - Trial Division:

	Prosecutor: (%)	**Defence: (%)**
• Depends:	*0*	*2.3*
• Always:	*19.4*	*2.3*
• Frequently:	*41.7*	*36.4*
• Sometimes:	*22.2*	*25.0*
• Rarely:	*13.9*	*22.7*
• Never:	*2.8*	*11.4*

(iii) Judges of the Supreme Court - Appeal Division:

	Prosecutor: (%)	Defence: (%)
• Depends:	*0*	*5.7*
• Always:	*40.9*	*11.4*
• Frequently:	*27.3*	*20.0*
• Sometimes:	*13.6*	*22.9*
• Rarely:	*13.6*	*25.9*
• Never:	*4.5*	*14.3*

(b) In your opinion, is this satisfactory? *(Please explain)*

• Answer: *Should not be done where judge is the trier of fact.*

52.

(a) The *Code of Professional Conduct* in Rule VIII states: *"When engaged as a prosecutor the lawyer's prime duty is not to seek a conviction, but to see that justice is done through a fair trial on the merits."* Would you describe this in any of the following terms: (%)

• A description of the system in practice: *64.3*
• A worthwhile, though perhaps unattainable, ideal: *33.3*
• Damaging to crime control if put in practice: *0.0*
• Other Depends: *2.4*

(b) Please explain:

53.

(a) How often do you discuss general policy matters concerning the prosecution of offences or the administration of criminal justice with officials of the municipality in which you work? (%)

• Always: *0*
• Frequently: *0*
• Sometimes: *7.1*
• Rarely: *26.2*
• Never: *66.7*

(b) Please state with whom and describe typical circumstances:

• Answer: *Municipal councils when there is a rash of a certain offence.*

54.

(a) How often do you discuss the prosecution of particular offences with officials of the municipality within which you work? (%)

- Always: *0*
- Frequently: *2.3*
- Sometimes: *2.3*
- Rarely: *16.3*
- Never: *79.1*

(b) Please explain:

55.

(a) How often do you discuss general policy concerning the prosecution of offences or the administration of criminal justice with journalists or other members of the media? (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *11.6*
- Rarely: *32.6*
- Never: *55.8*

(b) Under what circumstances:

56.

(a) How often do you discuss particular cases with which you are involved with journalists or other members of the media? (%)

- Always: *0*
- Frequently: *7.0*
- Sometimes: *18.6*
- Rarely: *30.2*
- Never: *44.2*

(b) Under what circumstances:

- Answer: *Usually avoided. Just to provide name/date of court appearance.*

57.

(a) How often do you give information or suggestions to correctional officials concerning the treatment of particular offenders? (%)

- Always: *0*
- Frequently: *2.3*
- Sometimes: *14.0*
- Rarely: *23.3*
- Never: *60.5*

(b) Please explain:

58.

(a) How would you describe the treatment presently accorded Black people in the criminal justice system as opposed to Whites?

	Prosecutor: (%)	**Defence: (%)**
• Equal:	*85.0*	*58.3*
• Better:	*7.5*	*4.2*
• Worse:	*7.5*	*37.5*

Explain:

(b) How would you describe the treatment presently accorded Native peoples in the criminal justice system as opposed to Whites?

	Prosecutor: (%)	**Defence: (%)**
• Equal:	*82.9*	*51.1*
• Better:	*12.2*	*8.9*
• Worse:	*4.9*	*37.9*

Explain:

59.

Please use the remaining space on this questionnaire to outline any issues, positive or negative, concerning the prosecution of offences and the administration of justice in the province which we may not have addressed in this questionnaire or which have become a matter of particular concern to you in your work as a Prosecuting Officer.

(ii) Questionnaire to Defence Counsel

1.

(a) How long have you acted as defence counsel in criminal prosecutions? (%)

- Less than 1 year: *0*
- Between 1 and 5 years: *45.1*
- Between 5 and 10 years: *19.6*
- Between 10 and 15 years: *25.5*
- Between 15 and 20 years: *7.8*
- More than 20 years: *2.0*

2.

What percentage of your practice is devoted to acting as a defence counsel? (%)

- Less than 20%: *19.6*
- Between 20% and 40%: *17.6*
- Between 40% and 60%: *29.4*
- Between 60% and 80%: *15.7*
- Over 80%: *17.6*

3.

Have you ever been employed by the Attorney General as a:(%)

(a) Prosecuting Officer:

- Yes: *2.1*
- No: *97.9*

(b) Assistant Prosecuting Officer:

- Yes: *4.2*
- No: *95.8*

(c) Per diem Prosecuting Officer:

- Yes: *2.0*
- No: *98.0*

(d) In another capacity *(please specify)*

.....

4.

How often do you act as defence counsel in the following courts:

(a) Provincial Court: (%)

- Always: *24.0*
- Frequently: *52.0*
- Sometimes: *18.0*
- Rarely: *6.0*
- Never: *0*

(b) County Court: (%)

- Always: *9.8*
- Frequently: *25.5*
- Sometimes: *31.4*
- Rarely: *27.5*
- Never: *5.9*

(c) Supreme Court Trial Division: (%)

- Always: *9.8*
- Frequently: *11.8*
- Sometimes: *35.3*
- Rarely: *25.5*
- Never: *17.6*

(d) Supreme Court Appeal Division: (%)

- Always: *7.8*
- Frequently: *9.8*
- Sometimes: *37.3*
- Rarely: *31.4*
- Never: *13.7*

(e) Supreme Court of Canada: (%)

- Always: *6.0*
- Frequently: *0.0*
- Sometimes: *4.0*
- Rarely: *8.0*
- Never: *82.0*

(f) Youth Court: (%)

- Always: *15.7*
- Frequently: *49.0*
- Sometimes: *3.9*
- Rarely: *25.5*
- Never: *5.9*

5.

What is the population of the jurisdiction in which you most frequently act in criminal matters? (%)

- Under 10,000: *2.0*
- Between 10,000 and 19,999: *18.4*
- Between 20,000 and 29,999: *4.1*
- Between 30,000 and 39,999: *14.3*
- Between 40,000 and 99,999: *14.3*
- Between 100,000 and 199,999: *22.4*
- Over 200,000: *24.5*

6.

As you know some Prosecuting Officers are assigned to a particular court for extended time periods. Have you experienced any difficulties when acting against a prosecuting officer who has appeared before the same judge for a prolonged period of time? If yes, give some examples.

7.

Do Prosecuting Officers make disclosure of their case to you:

(a) Automatically *(i.e.* without a request from you)? (%)

- Always: *7.8*
- Frequently: *9.8*
- Sometimes: *23.5*
- Rarely: *29.4*
- Never: *29.4*

(b) Only after a request for the disclosure of information? (%)

- Always: *41.7*
- Frequently: *45.8*
- Sometimes: *10.4*
- Rarely: *2.1*
- Never: *0*

8.

How often are you given unrestricted access to the Crown's file in a particular case? (%)

- Always: *15.7*
- Frequently: *39.2*
- Sometimes: *21.6*
- Rarely: *11.8*
- Never: *11.8*

9.

How often are the following pieces of information made available to you?

(i) Crown sheets: (%)

- Always: *78.4*
- Frequently: *11.8*
- Sometimes: *7.8*
- Rarely: *2.0*
- Never: *0*

(ii) All statements made by the accused: (%)

- Always: *64.7*
- Frequently: *29.4*
- Sometimes: *5.9*
- Rarely: *0*
- Never: *0*

(iii) All statements made by witnesses: (%)

- Always: *23.5*
- Frequently: *29.4*
- Sometimes: *39.2*
- Rarely: *7.8*
- Never: *0*

(iv) Names of persons who may have evidence whom the Crown intends not to call: (%)

- Always: *8.0*
- Frequently: *10.0*
- Sometimes: *16.0*
- Rarely: *46.0*
- Never: *20.0*

(v) Police reports: (%)

- Always: *11.8*
- Frequently: *23.5*
- Sometimes: *27.5*
- Rarely: *23.5*
- Never: *13.5*

(vi) Other: *(Please specify)*

.....

10.

(a) How often do Prosecuting Officers impose conditions on the way in which you use this information? (%)

- Always: *27.5*
- Frequently: *13.7*
- Sometimes: *19.6*
- Rarely: *29.4*
- Never: *9.8*

(b) What kind of conditions, if any, are most often imposed?

.....

(c) Why in your opinion do Prosecuting Officers impose these conditions?

(i) to protect witnesses: (%)

- Always: *10.9*
- Frequently: *26.1*
- Sometimes: *34.8*
- Rarely: *19.6*
- Never: *8.7*

(ii) to prevent the loss of physical evidence: (%)

- Always: *2.3*
- Frequently: *2.3*
- Sometimes: *23.3*
- Rarely: *37.2*
- Never: *34.9*

(iii) because of a bad prior experience with you or other defence counsel: (%)

- Always: *4.7*
- Frequently: *18.6*
- Sometimes: *23.3*
- Rarely: *27.9*
- Never: *25.6*

(iv) because the investigating officer has expressed personal opinions in some of the documents in the file: (%)

- Always: *2.3*
- Frequently: *9.3*
- Sometimes: *44.2*
- Rarely: *27.9*
- Never: *16.3*

(v) Other: (%)

- Always: *5.9*
- Frequently: *41.2*
- Sometimes: *29.4*
- Rarely: *5.9*
- Never: *17.6*

Explain:

11.

(a) In your experience, how much evidence do Prosecuting Officers usually call when conducting a preliminary inquiry?

(i) only enough evidence to get a committal for trial: (%)

- Always: *10.2*
- Frequently: *53.1*
- Sometimes: *28.6*
- Rarely: *8.2*
- Never: *0*

(ii) all witnesses known to the Crown likely to be called at trial: (%)

- Always: *0*
- Frequently: *30.6*
- Sometimes: *20.4*
- Rarely: *34.7*
- Never: *14.3*

12.

(a) How frequently are guilty pleas the product of plea negotiation? (%)

- Always: *0*
- Frequently: *56.9*
- Sometimes: *39.2*
- Rarely: *3.9*
- Never: *0*

(b) Please estimate in percentage terms:

13.

(a) How often do Prosecuting Officers initiate plea negotiations? (%)

- Always: *0*
- Frequently: *5.9*
- Sometimes: *25.5*
- Rarely: *64.7*
- Never: *3.9*

(b) In your opinion how often have the following factors led the Prosecuting Officer to suggest a negotiated plea?

(i) uncertainty about the availability of sufficient proof to sustain a conviction: (%)

- Always: *6.0*
- Frequently: *30.0*
- Sometimes: *50.0*
- Rarely: *12.0*
- Never: *2.0*

(ii) to prevent a backlog in case load on the court docket: (%)

- Always: *0*
- Frequently: *10.0*
- Sometimes: *28.0*
- Rarely: *42.0*
- Never: *20.0*

(iii) to gain the accused's cooperation in the prosecution of others: (%)

- Always: *0*
- Frequently: *6.0*
- Sometimes: *48.0*
- Rarely: *38.0*
- Never: *10.0*

(iv) a consideration of the interests of the victim: (%)

- Always: *0*
- Frequently: *4.0*
- Sometimes: *68.0*
- Rarely: *24.0*
- Never: *6.0*

(v) a recommendation of a departmental superior: (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *17.0*
- Rarely: *55.3*
- Never: *27.7*

(vi) Other? Explain: (%)

- Always: *0*
- Frequently: *42.9*
- Sometimes: *21.4*
- Rarely: *0*
- Never: *35.7*

14.

(a) How often do you initiate plea negotiations? (%)

- Always: *8.0*
- Frequently: *60.0*
- Sometimes: *26.0*
- Rarely: *6.0*
- Never: *0*

(b) What factors motivate you in such negotiations?

(i) to minimize the length and severity of the accused's sentence: (%)

- Always: *11.8*
- Frequently: *68.6*
- Sometimes: *17.6*
- Rarely: *2.0*
- Never: *0*

(ii) to permit the accused to avoid the public disgrace of a trial: (%)

- Always: *0*
- Frequently: *9.8*
- Sometimes: *25.5*
- Rarely: *52.9*
- Never: *11.8*

(iii) to obtain for the accused a faster and less expensive procedure: (%)

- Always: *3.9*
- Frequently: *54.9*
- Sometimes: *29.4*
- Rarely: *7.8*
- Never: *3.9*

(iv) to quickly dispose of an unwanted case: (%)

- Always: *0*
- Frequently: *0*
- Sometimes: *7.8*
- Rarely: *21.8*
- Never: *70.6*

(v) Other: (*Please specify)*

.....

15.

(a) Which of the following have you requested (or have Prosecuting Officers offered) in return for a plea of guilty? *(see next page)*

(i) a reduction in the charge to a lesser or included offence: (%)

- Always: *0*
- Frequently: *47.1*
- Sometimes: *43.1*
- Rarely: *7.8*
- Never: *2.0*

(ii) a withdrawal of other charges: (%)

- Always: *0*
- Frequently: *62.7*
- Sometimes: *37.3*
- Rarely: *0*
- Never: *0*

(iii) a favourable recommendation as to the severity of the sentence: (%)

- Always: *3.9*
- Frequently: *54.9*
- Sometimes: *29.4*
- Rarely: *7.8*
- Never: *3.9*

(iv) use of summary conviction procedure rather than proceeding by way of indictment: (%)

- Always: *2.0*
- Frequently: *17.6*
- Sometimes: *51.0*
- Rarely: *27.5*
- Never: *2.0*

(v) a promise by the Prosecuting Officer not to oppose release on bail or release after conviction but before sentence: (%)

- Always: *0*
- Frequently: *3.9*
- Sometimes: *13.7*
- Rarely: *47.1*
- Never: *35.3*

(vi) a promise by the Prosecuting Officer not to apply for a harsher penalty in accordance with s. 592 of the *Criminal Code* where the accused has a previous conviction for the same offence: (%)

- Always: *0*
- Frequently: *3.9*
- Sometimes: *19.6*
- Rarely: *39.2*
- Never: *37.3*

(vii) a promise not to force a jury trial under s. 498 of the *Criminal Code:* (%)

- Always: *0*
- Frequently: *2.0*
- Sometimes: *17.6*
- Rarely: *33.3*
- Never: *47.1*

(viii) a promise not to charge friends or family of the accused: (%)

- Always: *0*
- Frequently: *2.0*
- Sometimes: *17.6*
- Rarely: *33.3*
- Never: *47.1*

(ix) a promise or a recommendation as to the type of treatment, the place of imprisonment, or the time of parole: (%)

- Always: *0*
- Frequently: *9.8*
- Sometimes: *29.4*
- Rarely: *35.3*
- Never: *25.5*

(x) Others? *(Explain)*

16.

(a) How often are pre-sentence reports made available to you for use in sentencing hearings? (%)

- Depends: *2.0*
- Always: *25.5*
- Frequently: *58.8*
- Sometimes: *11.8*
- Rarely: *0*
- Never: *2.0*

(b) In making submissions on sentencing, how often are you guided by the information found in pre-sentence reports? (%)

- Always: *7.8*
- Frequently: *62.7*
- Sometimes: *25.5*
- Rarely: *2.0*
- Never: *2.0*

17.

(a) As you are aware, Prosecuting Officers, in some situations, prepare "Summaries for Trial Judges". Comment on any problems associated with the presentation to Trial Judges of these summaries?

(b) How often are these summaries made available to you? (%)

- Depends: *2.4*
- Always: *19.0*
- Frequently: *7.1*
- Sometimes: *11.9*
- Rarely: *11.9*
- Never: *47.6*

(c) If these summaries have been disclosed to you, how often have you objected either to the general use of these summaries or to the way in which particular information was presented in a summary? (%)

- Always: *0*
- Frequently: *6.3*
- Sometimes: *21.9*
- Rarely: *25.0*
- Never: *46.9*

18.

(a) How often do you participate in pre-trial conferences in criminal matters? (%)

- Depends: *8.2*
- Always: *6.1*
- Frequently: *10.2*
- Sometimes: *24.5*
- Rarely: *30.6*
- Never: *20.4*

(b) What issues are most often discussed in pre-trial conferences?

(c) Please comment on the value of pre-trial conferences?

19.

(a) In your experience, how often do pre-trial conferences have an impact on plea negotiation? (%)

- Always: *0*
- Frequently: *9.3*
- Sometimes: *20.9*
- Rarely: *46.5*
- Never: *23.3*

(b) Please give examples:

20.

(a) In matters heard in the following courts, how often do you feel that judges have read the transcript of the preliminary inquiry?

(i) Judges of the County Court: (%)

- Depends: *2.3*
- Always: *2.3*
- Frequently: *36.4*
- Sometimes: *25.0*
- Rarely: *22.7*
- Never: *11.4*

(ii) Judges of the Nova Scotia Supreme Court - Trial Division: (%)

- Depends: *2.3*
- Always: *7.9*
- Frequently: *26.3*
- Sometimes: *42.1*
- Rarely: *15.8*
- Never: *5.3*

(iii) Judges of the Supreme Court - Appeal Division: (%)

- Depends: *5.7*
- Always: *11.4*
- Frequently: *20.0*
- Sometimes: *22.9*
- Rarely: *25.7*
- Never: *14.3*

(b) Is this satisfactory? *(Please explain)*

21.

(a) Do you think there ought to be a "special prosecutions" unit in the Attorney General's Department which would prosecute particularly complex or sensitive cases? (%)

- Yes: *60.4*
- No: *33.3*
- Depends: *6.3*

(b) If your answer to (a) was yes, state briefly your reasons why such a unit would be valuable and what kinds of offences it might handle.

(c) If your answer to (a) was no, state why you think a special prosecutions unit is not advisable.

22.

(a) How would you describe the treatment presently accorded Black people in the criminal justice system as opposed to Whites? (%)

- Equal: *58.3*
- Better: *4.2*
- Worse: *37.5*

(b) How would you describe the treatment presently accorded Native peoples in the criminal justice system as opposed to Whites? (%)

- Equal: *51.1*
- Better: *8.9*
- Worse: *37.8*

23.

Please use the remaining space on this questionnaire to outline any issues, positive or negative, which you feel are relevant to the administration of justice in Nova Scotia. More specifically, do you object to or applaud procedure(s) followed by the Attorney General's Department or by particular Prosecuting Officers?